No. 14731

United States Court of Appeals

For the Ninth Circuit

AVALO ALLISON FISHER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Western District of Washington, Northern Division, convicting appellant on the first four counts of a six-count indictment (A.1),[1] which charged violation of 18 United States Code, Section 1001. Jurisdiction below is based on Section 3231 of Title 18 of the United States Code. Appellant was acquitted on the fourth and fifth counts of the indictment. Jurisdiction of this Court is conferred by 28 United States Code, Sections 1291 and 1294.

[1] "A" references are to the Appendix of appellant's brief, and are followed by a number designating which item of the Appendix is referred to. "Tr." references are to the Clerk's orignial transcript. "R" references are to the Reporter's transcript of proceedings and "X" references are to the Government Exhibits.

STATEMENT OF THE CASE

Section 9(h) of the Labor Management Relations Act, 1947, 61 Stat. 143, 146, 29 U.S.C. 159(h), commonly known as the Taft-Hartley Act, provides that a labor organization shall not have access to the processes of the National Labor Relations Board unless there is filed annually an affidavit by each of its officers "that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

Appellant had been an executive board member of District 23, Local 93, International Woodworkers of America, formerly District 2, Local 93. On June 29, 1951, July 11, 1952, and June 5, 1953, appellant executed affidavits under the terms of the said Section 9(h) of the said Act (X. 1, R. 38; X's. 2, 3, R. 44, 45).

The indictment charged violation of the False Statements Act, 18 U.S.C. 1001, in six counts, alleging that two crimes had been committed in the signing of each of the three non-Communist affidavits. Specifically, this was done by alleging that each affidavit was false in two respects, in that at the time appellant executed each affidavit he was, in fact, a member of the Communist Party (Counts 1, 3 and 5), and simultaneously was "affiliated" with the Communist Party (Counts 2, 4 and 6) (A.1).

The jury acquitted appellant of the fifth and sixth

counts (Tr. 27), and he was sentenced to five years' imprisonment on each of the remaining four counts, the sentences to run concurrently (Tr. 34).

The indictment did not charge any falsity in the belief portion of the affidavits, or membership in an organization believing in or teaching the overthrow of the government by force or illegal methods.

The trial court denied all pre-trial motions made by appellant, including motions to dismiss the indictment (Tr. 3, 16), motion to require election of counts (Tr. 4); motion for discovery and inspection (Tr. 5), motion for bill of particulars (Tr. 6, 15). During the trial the District Court denied appellant's motions for production and admission of records showing the amount of money paid to the major government witness Harley Mores, by the Federal Bureau of Investigation (R. 333, 335, 336, 369, 370) and renewed motion for same (R. 749). The District Court denied appellant's motion to strike prejudicial and irrelevant testimony given by the witness Clark Harper (R. 410-412) and the District Court refused to permit appellant to show that government witness Clark Harper had testified falsely under oath in making identification of alleged Communists (R. 463-522). The District Court denied appellant's motion for judgment of acquittal made at the conclusion of the government's case (R. 647). The District Court refused to grant appellant to call United States Attorney Harris as a witness for the defense in order to prove prior inconsistent statements by the government witness Clark Harper and to prove that said wit-

ness did not have any direct knowledge of appellant's membership in the Communist Party (R. 692-699).

At the conclusion of the trial, the District Court denied appellant's motion for arrest of judgment (Tr. 29, 33) and motion for judgment of acquittal or, in the alternative, for a new trial (Tr. 28), based on the grounds previously alleged and upon the prejudicial error committed by the government in closing argument to the jury.

The instructions to the jury by the trial court will be discussed more fully in the body of the brief.

The Evidence In The Case

As we have already indicated by the reference to the denial of all motions for an amended bill of particulars and amended motion to dismiss and to compel election of counts (Tr. 15, 16, 4), the government never at any time throughout the trial made any clear-cut distinction between the terms "membership" and "affiliation." No witness attempted to define these terms nor did the government propose such distinctions by way of argument, and, as our argument on this point will show, no clear-cut distinction was made in the instructions given to the jury.

Apparently, it was the government's theory of the case to attempt to prove by "inference" (Tr. 13) that appellant was a member of and affiliated with, the Communist Party at the time he signed the three non-Communist affidavits (X's. 1, 2, 3), and that if the jury did not believe that the evidence was sufficient to con-

stitute membership, that it might nevertheless convict appellant under the counts alleging "affiliation."

The government presented nine witnesses, of whom four were technical witnesses:

(a) CASTLE (R. 14), the business agent of appellant's local union, testified that appellant had signed the affidavits and that the local union has had matters before the National Labor Relations Board since the filing of the first affidavit signed by appellant. While he was on the witness stand, he was also made a witness for the appellant, and testified as to appellant's good character and reputation in the community (R. 33, 34).

(b) SCHELDT (R. 36), a notary public, testified to witnessing the signing by appellant of Exhibit 1, in 1951. He also testified to the good character of the appellant (R. 40, 41).

(c) BOWDEN (R. 42), a notary public, testified to having witnessed the signing by appellant of Exhibits 2 and 3, in 1952 and 1953, respectively.

(d) GRAHAM (R. 46), Regional Director, Nineteenth Region, N.L.R.B., residing in Seattle, Washington, testified that the local had availed itself of the services of the N.L.R.B.

The first two non-technical witnesses for the government, ODLE (R. 73) and DURHAM (R. 77), police officers, testified to an incident allegedly taking place on June 6, 1930, one year prior to the signing of the first affidavit (R. 74-76) in which they saw appellant in possession of some "white pamphlets." Odle testified that

at the time appellant denied to him that he was a Communist (R. 76). The witness Durham (R. 77), in connection with this incident, confirmed the presence of "an unusual amount of white pamphlets." To show that this is a fair statement of the testimony, the full testimony relating to the incident is set forth in Appendix Item 2, p. 73).

Only three witnesses testified as to anything which could conceivably connect appellant to the Communist Party at any time. These were the witnesses Harley Mores, his wife Mazie Mores, and Clark Harper. The testimony of Harper as will later be argued, was immaterial and prejudicial, in that it had no relation to any of the items or events set forth in the indictment, and in other respects.

The testimony of Harley Mores (R. 89) constituted the sole testimony against the appellant, and consisted of testimony concerning meetings which the witness characterized as being meetings of members of the Communist Party, on two of which occasions appellant is alleged to have given the witness certain documents (X.'s 7, 8, 9) in a capacity of a member of the Communist Party. The testimony of this witness will be analyzed in argument *infra,* relating to the sufficiency of the evidence.

The witness Mazie Mores, wife of Harley Mores, agreed (R. 611), with the testimony of her husband only with reference to one conversation, two meetings dated December 26, 1952, and another meeting in May of 1953 (A. 611 *et seq.*).

Appellant, in his argument hereinafter, discusses the testimony of Harper, and Harley and Mazie Mores in considerable detail, in order to show that the verdict was not supported by the evidence and that, *a fortiorari,* under the perjury rule, a judgment of acquittal was mandatory.

Appellant's argument will also discuss errors committed by the trial court preventing appellant from having a fair trial, in admitting irrelevant and incompetent evidence and in excluding the evidence offered by appellant, and in certain misconduct in the government's argument to the jury.

Appellant presented four witnesses in addition to the character testimony of the two government witnesses (Castle, R. 14), (Scheldt, R. 40, 41). These witnesses were his employer, Merle C. Hitchcock (R. 703), Frank Padavich, a fellow townsman in North Bend, Washington (R. 702), Frank Swanson, a fellow member of the Executive Board of appellant's union (R. 709), and his next-door neighbor, John G. Huber R. 729).

STATUTE INVOLVED

18 United States Code 1001 reads as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fradulent

statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. (June 25, 1948, c.645, §1, 62 Stat. 749)."

STATEMENT OF POINTS

Appellant relies upon each and every one of the concise statements of points heretofore filed in this court and said statement of points is incorporated herein as follows:

1. The District Court erred in denying appellant's motion to dismiss the indictment (Tr. 3) and amended motion to dismiss the indictment (Tr. 16) upon the grounds that:

a. The indictment is based upon Section 9(h) of the Labor Management Relations Act of 1947, and said Act and indictment are unconstitutional, abridging rights guaranteed by the First Amendment, and said Section 9(h) is so vague and indefinite as to render it unconstitutional under the First and Fifth Amendments;

b. The indictment does not set forth with sufficient clearness, precision and certainty the time, place and manner in which the offense is alleged to have been committed, and is vague and indefinite to the extent that appellant was unable to prepare his defense, and there is a fatal inconsistency and contradiction between the charge alleged in Count I and the charge alleged in Count II, and the same is true with respect to Counts III and IV, and V and VI respectively;

c. The indictment does not state facts sufficient to constitute an offense against the United States, and the indictment is vague and indefinite and fails to in-

form the defendant adequately of the offense charged so as to enable him to make his defense;

d. The indictment alleges three offenses in six counts, to the prejudice of the appellant;

e. The indictment omits an essential element of the alleged offense, in that it fails to state that the alleged false statements and representations were material, or to state facts to show their materiality;

f. The second and fourth and sixth counts of the indictment are vague and indefinite in that they charge the appellant with alleged false statements, in that he denied that he was "affiliated" with the Communist Party, said word "affiliated" having no precise meaning and being vague, uncertain and indefinite in character, thereby providing no intelligible standard of conduct, and therefore failing to give appellant any fair or adequate notice of the offense charged;

g. The indictment fails to state overt acts to show when, where and in what manner, or by virtue of what facts, appellant was "affiliated" with the Communist Party at the time of the alleged offense ;

h. Section 1001 or Title 18, and Section 159(h) of Title 29, of the United States Code, under which the indictment is brought, and pursuant to which the alleged affidavits were allegedly executed and filed, are unconstitutional on their face, and as applied to the appellant, and, in particular, violate Article I, Section 9, Clause 3, and the First, Fifth, Ninth and Tenth Amendments to the United States Constitution, Sec. tion 1001 of Title 18, and Section 159(h) of Title 29

of the United States Code, pursuant to which the alleged false affidavits were allegedly executed and filed, and as applied to the appellant by the indictment, violate the foregoing and above stated provisions of the United States Constitution, in that the indictment does not state:

1. That appellant did or does believe in, teach or advocate political strikes;
2. That any organization of which appellant may be an officer acted or acts in such a manner as to be a burden on or obstruction to interstate commerce;
3. That there was or is a probability or danger that either appellant or any labor organization of which he may have been an officer has engaged or will engage in political strikes or any conduct or activity which has been or will be an obstruction to or burden on interstate commerce.

2. The District Court erred in denying appellant's motion to require election of counts, in which appellant requested an order requiring the appellee to elect between Counts I or II, III or IV, V or VI, respectively, of the indictment, on the ground that appellant would be prejudiced by the improper multiplicity of counts (Tr. 4).

3. The District Court erred in denying appellant's motion for discovery and inspection on the ground that such discovery and inspection was necessary to enable the appellant to prepare his defense (Tr. 5).

4. The District Court erred in denying appellant's motion for bill of particulars filed July 7, 1954 (Tr. 6),

and amended motion for bill of particulars filed September 30, 1954 (Tr. 15), on the ground and for the reason that a bill of particulars as requested by the appellant was necessary in order to enable him to prepare his defense, and which was further necessary to define the offense charged with sufficient certainty to enable appellant to prepare his defense, within the meaning of the Sixth Amendment of the Constitution, and in violation of appellant's right to due process of law within the meaning of the Fifth Amendment of the United States Constitution.

5. The District Court erred in denying appellant's motion for production and admission of records showing the amount of money paid the witness Harley Mores by the Federal Bureau of Investigation from 1942 until 1953, including a monthly statement of the monthly sums paid during that time, in the following particulars:

a. The District Court erred in denying appellant's demand for said records, on the ground that said records, namely receipts which the witness testified to having signed for all moneys paid him, would impeach the witness' testimony, to the effect he had testified that he has received said money only as "expense" money and that there was no element of profit, and appellant offered to prove by the said receipts that said testimony was untrue (R. 333, 335, 336, 369-370);

b. The District Court erred in denying said motion, on the further ground that said documents constituted essential and material evidence going to the veracity and credibility of the witness (R. 334), and to show

that the amount of money received by the witness was considerably greater than the amount testified to (R. 335);

c. The District Court erred in denying said motion, of appellant, on the further ground that the alternative decision of the court, namely, to allow presentation by appellee of a statement purporting to represent the total amount received by the witness (R. 367), in lieu of the precise statements demanded by appellant as set forth above, as related to a conflict as to whether or not the money received by the witness was expense money or compensation, and that the evidence demanded was relevant and material as going to show the witness' "interest" and motive (R. 369-370);

d. The District Court erred in denying appellant's renewed motion for production of said receipts showing all payments made to the witness Mores, on all of the above stated grounds, at the conclusion of appellant's case (R. 749).

6. The District Court erred in allowing the witness Clark Harper to "explain" an answer which did not call for explanation, and in failing to strike the highly prejudicial "explanation" that was given (R. 410-412) as moved for by appellant on the ground that said "explanation" was highly prejudicial, speculative and did not constitute permissible direct testimony because of its opinion nature, since it permitted the government witness to give an opinion and speculate as to the guilt or innocence of the appellant.

7. The District Court erred in refusing to allow appellant's question, asked of the government witness

Clark Harper, and directed to show that on October 20, 1954, before the Justice Department Security Board, the witness had falsely testified under oath on two occasions, by falsely identifying two persons as having attended Communist Party meetings with the witness; that the question so directed was relevant, competent and material to show that the witness Harper had testified falsely under oath, or, in the alternative, at the very least, that the witness Harper is completely unreliable as a witness with respect to identification and testimony concerning persons with whom he has attended Communist Party meetings (R. 463-515).

8. The District Court erred in denying appellant's motion for judgment of acquittal made at the conclusion of the government's case (R. 647) on the following grounds:

a. That the evidence was insufficient to sustain a conviction;

b. That *a fortiorari,* the evidence was insufficient within the meaning of the perjury rule, applicable to this case, requiring that the government prove the falsity of the alleged affidavits by the direct evidence of two witnesses, or the direct evidence of one witness supported by strong corroborative evidence;

c. That the indictment was and is insufficient and legally improper because of the multiplicity of counts, because, under the indictment, appellant was unable to prepare a defense, and because the indictment was insufficient to allege materiality (R. 647-691).

9. The District Court erred in denying appellant's

motion for judgment of acquittal filed December 1, 1954 (R. 24) on the grounds as set forth in Point 8 above.

9(A). The District Court erred in refusing to permit appellant to call United States Attorney Harris as a witness for the defense, and in refusing appellant's offer of proof showing that government witness Clark Harper did not have any direct knowledge of any alleged membership of appellant in the Communist Party, or of any activities of appellant carried on in support of or in relationship to the Communist Party (R. 692-699).

10. The District Court erred in denying appellant's motion for judgment of acquittal renewed at the conclusion of the trial, when the defense had rested, on the grounds set forth in Point 8 hereinabove (R. 863).

11. The District Court erred in instructing, and failing to instruct the jury, as follows:

a. In instructing the jury that circumstantial evidence is legal and competent as a means of proving the guilt of appellant, for the reason that the necessary quantum of proof in a case in which a necessary or material element is perjury, such must be proved by the direct evidence of one witness plus strong corroborative evidence, or evidence of two witnesses (843-844); and

in failing to give appellant's requested instruction No. 9, to the effect that that quantum of proof is necessary in such a case (Tr. 23);

b. In instructing the jury that in weighing the testi-

mony of witnesses paid by the government to join the Communist Party and report their activities to the Federal Bureau of Investigation, the jury should scrutinize such testimony with care and caution, and after consideration of such testimony, if the jury found said witnesses had testified truthfully, such testimony was as good as the truth testified to from any other source (R. 845-846) for the reason that such was an erroneous statement of the law with respect to such witnesses and in that said instruction was incomplete, in that the jury should have been instructed as follows:

"If you find that such witnesses have testified untruthfully, such testimony may be disregarded by you insofar as you decide it is untruthful, and when it is not corroborated from any other source;"

c. In instructing the jury as to the meaning of the words "member" and "affiliated" (R. 853-854) as used in the indictment in connection with the Communist Party; and in failing to give a true and proper definition of said terms, and in failing to give appellant's requested instruction No. 14 (Tr. 23), defining said terms, for the reason that the court's definition of said terms is not definition which applies by virtue of the Taft-Hartley Act and the legislative history of said Act, and the court's definition being so vague and indefinite as to furnish the jury with no ascertainable standard of guilt;

d. In failing to instruct the jury as follows:

(1) In failing to give appellant's requested instruc-

tion No. 10 (Tr. 23), containing a proper, adequate and legal definition of the term, "member of the Communist Party" (R. 869-870);

(2) In failing to give appellant's requested instruction No. 11 (Tr. 23) (R. 871), which could have instructed the jury that any evidence, or inference therefrom, relating to appellant's beliefs, was immaterial to any issue of the case and was to be disregarded;

(3) In failing to give appellant's requested instruction No. 15 (Tr. 23) containing cautionary instruction with respect to the testimony of witnesses who the jury might believe were testifying through hope of personal gain or benefit; and in failing to instruct the jury to scrutinize and scrupulously examine the testimony of the witness and determine whether there was any motive, interest, financial or otherwise, or any element of corruptive influence in their testimony against appellant.

12. The District Court erred in denying appellant's motion for arrest of judgment (Tr. 29) (Tr. 33), and motion for judgment of acquittal or, in the alternative, for a new trial (Tr. 28) on the grounds set forth in Points 1 through 9, hereinabove, and on the further ground that the United States Attorney committed prejudicial error in his closing argument to the jury (R. 826-836), calculated to arouse the bias of the jury, in his reference to Alger Hiss, his reference to appellant's counsel (quoting from the "Christian" Bible) and in his appealing to the passions of the jury by characterizing the Communist Party (with reference

to matters not in issue), and by an unwarranted attack upon one of appellant's counsel.

Without waiving any of the points stated above, appellant intends to argue herein that the appellant was deprived of a fair trial in that:

1. (a) The indictment did not set out the necessary essentials of the offense charged, nor did it set forth with sufficient clearness, precision and certainty, the time, place and manner in which the offenses are alleged to have been committed, and is vague and indefinite to the extent that appellant was unable to prepare a proper defense.

(b) The indictment, and count thereof, is further vague and indefinite because it does not advise nor inform a defendant of that with which he is charged, and it contains vital inconsistencies and contraction between the charges alleged in counts one and three, and the charges alleged in counts two and four.

(c) The indictment is invalid because it alleges and splits three alleged offenses into six inconsistent and multiplicitous counts.

2. The trial court admitted irrelevant and incompetent evidence and prejudicial evidence.

3. The trial court excluded relevant evidence offered by appellant.

4. The jury was erroneously instructed.

5. The trial court erred in denying appellant's motion for judgment of acquittal or in the alternative for a new trial.

ARGUMENT

Point I.

APPELLANT WAS DEPRIVED OF A FAIR TRIAL THROUGH THE INFIRMITIES OF THE INDICTMENT.

A. The Indictment Did Not Set Out the Necessary Essentials of the Offense Charged Nor Did It Set Forth with Sufficient Clearness, Precision and Certainty, the Time, Place and Manner in Which the Offenses Are Alleged to Have Been Committed and Is Vague and Indefinite to the Extent that Appellant Was Unable to Prepare a Proper Defense.

The indictment charges a violation of the False Statements Act (18 U.S.C. 1001) in that the defendant filed with the National Labor Relations Board an affidavit which falsely denied membership in (first, third and fifth counts) or affiliation with (second, fourth and sixth counts) the Communist Party.

The Act is applicable to, and the National Labor Relations Board has jurisdiction only over, certain aspects of labor relations involving employees engaged in interstate commerce or in the production of goods for interstate commerce. It provides that no labor organization of such employees may use the facilities of the Board unless each of its officers annually files with the Board an affidavit that

> "he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." (29 U.S.C. 159(h))

The constitutionality of this affidavit "as herein construed" was upheld by an equally divided 3-3 court in *American Communications Association v. Douds,* 339 U.S. at 415, 94 L.ed. 925, at 953. In *Osman v. Douds,* 339 U.S. at 846, 94 L.ed. 1328, the vote became 4-4. The court, Mr. Justice Black dissenting, upheld that part of the statute, as construed by the prevailing opinion, which was concerned with membership in or affiliation with the Communist Party, Mr. Justice Frankfurter dissenting as to "affiliation." With respect to the balance of the affidavit the court was equally divided, the Chief Justice, Justices Reed, Burton and Minton voting to uphold the statute as construed by the prevailing opinion, and Justices Black, Douglas, Frankfurter and Jackson dissenting. *Osman v. Douds, supra,* at 847-S[2].

Defendant contends that the indictment is fatally defective because it fails to set out the necessary essentials of the offense as defined in 18 U.S.C. 1001 and also because it fails to comply with the construction of the affidavit read into it by Douds in order to save it from unconstitutionality.

The ingredients of the offense under 18 U.S.C. 1001 are:

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[2] It is well settled that affirmance by an equally divided court concludes the parties but is not a precedent either in the Supreme Court or the lower courts. *Hertz v. Woodman,* 218 U.S. 205; *Hanifen v. Armitage,* 117 Fed. 845. Mr. Justice Clark, whose vote would have been decisive, did not participate. It is noteworthy, however, that he was Attorney General at the time that the President vetoed that Act, among other reasons, because of the presence of the affidavit requirement. (93 Cong. Rec. 7500, June 20, 1947, at 7503)

1. A false statement concerning
2. A material fact[3]
3. Knowingly and wilfully made
4. With knowledge of its falsity
5. In a matter within the jurisdiction of an agency.

(a) The indictment is insufficient because it fails to allege that the alleged false statements were material.

The indictment does not state that any of the alleged false statements were material, nor does it allege any facts to show their materiality. Since materiality is an essential ingredient of the offense by the express terms of the statute, the indictment is fatally defective on this ground alone. *Rolland v. United States,* 200 F.(2d) 678 (CA 5, 1953); *Cf., United States v. Moore,* 185 F. (2d) 92 (CA 5, 1952); *United States v. Harris,* 104 F. (2d) 41; *United States v. Danaher,* 39 F.(2d) 325; *United States v. U.S. Cartridge Co.,* 95 F.Supp. 384, affd. 198 F.(2d) 456.

In the recent case of *United States v. Rolland, supra,*

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[3] Section 1001 has three clauses. "Material" appears only in the first. However, it is settled that this word modifies all three clauses and that an immaterial statement although false, is not within the purview of any clause of the statute. *United States v. U.S. Cartridge Co.,* 95 F. Supp. 384 (E.D. Mo. 1950), affirmed, 198 F.(2d) 456 (CA 8); *United States v. Moore,* 185 F.(2d) 92 (CA 5 1950); *Lea v. United States,* 167 F.(2d) 13 (CA 6 1948); *Harris v. United States,* 104 F.(2d) 41 (CCA 8, 1939); *Danaher v. United States,* 39 F.(2d) 325 (CCA 8, 1930); *Rolland v. United States,* 200 F.(2d) 678 (CA 5, 1953).

defendant were indicted under 18 U.S.C. 1001 for false statements concerning the earnings of their employees "in a matter within the jurisdiction" of the wage and hour and public contracts division of the Labor Department. In dismissing the indictment for insufficiency after defendants had been convicted thereon, the court said (at 679-80):

> "The challenged counts here do not allege that the statements complained of were 'material,' they do not state facts which show them to be.
>
> "Count one does charge that the defendants 'made and furnished . . . a statement setting forth' . . . that the defendants had paid one Ward the sum of $94.47 when they well knew that such payment had not been made. It does not, however, allege that the statement was 'material,' nor does it allege, that that amount was actually due to the employee named . . . Count One of the indictment failed to charge an offense in that neither in *haec verba,* nor in substance, did it charge the essential fact that the complained of statement was material."

To the same effect is *Harris v. United States,* 104 F.(2d) 41 (CCA 8, 1939).

This indictment does not allege that the statements were material. Nor does it state facts to show their materiality. In order for the statements to be material they would have had to have been filed for the purpose of securing "compliance" with the Act with the intent that the facilities of the Board be made available to the union, and that they were made in a matter affecting interstate commerce and by an officer of a labor organization as defined by the Act. The indictment contains none of these allegations which might substitute for the

failure to allege materiality. The allegation that the statement was made in a matter "within the jurisdiction" of the Board is insufficient because 18 U.S.C. 1001 requires both that the statement be within the jurisdiction of the agency and that they be material, as *Rolland* points out. In that case there was an allegation that the false statements were "within the jurisdiction" of the agency but the indictment was nevertheless held invalid because it omitted to state that they were material or how they were material.

Since none of the counts alleges "materiality" the indictment is insufficient as to each count.

An indictment must set out every element of the crime expressly embodied in the statute (*Moore v. United States,* 160 U.S. 268; *Anderson v. United States,* 294 Fed. 593 (CA 2); *United States v. McGuire,* 64 F.(2d) 485 (CA 2); *Sutton v. United States,* 157 F.(2d) 661 (CA 5); *United States v. Valenti,* 74 F.Supp. 718 (W.D. Pa.) and, in addition, every element of the offense which, although not expressly set forth in the statute, has been held, by interpretation or otherwise, to be an essential ingredient thereof. *United States v. Carll,* 105 U.S. 611, at 612-3. See also *Pettibone v. United States,* 148 U.S. 197; *Keck v. United States,* 172 U.S. 434.

In particular, where a statute is couched in broad terms and on its face embraces wider restrictions than the court is willing to sanction, the indictment must allege *the concrete facts which bring the offense within the permitted area of the statute. United States v. Hess,* 124 U.S. 483; *Potter v. United States,* 155 U.S. 438;

Anderson v. United States, 294 Fed. 593 (CA 2). See also *United States v. Cruikshank,* 92 U.S. 542, at 557-8.

In *Screws v. United States,* 325 U.S. 91, the Supreme Court held a provision of the Civil Rights Act to be constitutional only if construed to require a specific intent. An indictment which failed to charge the intent required under this judicial construction was held insufficient. *Pullen v. United States,* 164 F.(2d) 756 (CA 5). See also *United States v. Britton,* 107 U.S. 665; *United States v. Korner,* 56 F.Supp. 242; *United States v. Specht,* 57 F.Supp. 79.

The requirement that the essential elements of the offense be stated with particularity is especially important where the statute is couched in broad terms, is potentially applicable in a wide variety of circumstances and to numerous individuals, and imposes restrictions upon basic democratic rights. In the leading case of *Fontana v. United States,* 262 Fed. 283 (CCA 8) Judge Sanborn, speaking for a unanimous court on this point, said (at p. 288):

> "It is an elementary rule of criminal law that when language does not constitute a crime if uttered under some circumstances, and does constitute a crime if uttered under other circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. The facts must be set forth, so that the court can determine, and not the pleader, whether or not they constitute the crime."

See also *United States v. Schutte,* 252 Fed. 212 (D.C.N.D.); *Foster v. United States,* 253 Fed. 481 (CA

9); *Collins v. United States,* 253 Fed. 609 (CA 9); and *United States v. Ault,* 263 Fed. 800 (D.C.W.D. Wash.).

The prevailing opinion in *Douds,* expressly to save the statute from unconstitutionality, construed it as follows:

1. The statute is valid as a regulation of interstate commerce in the face of a danger of political strikes from Communist leaders and those who hold a belief in violent overthrow "other than loyalty to the Communist Party." 339 U.S. at 388, 392-3.
2. The "belief" referred to is belief in forcible overthrow, but only if such belief is held as an objective and not as a prophecy (at 407).
3. The affidavit is not intended to "force disclosure of attitudes on all manner of social, economic, moral and political issues." (at 410).
4. The prescribed belief, as the prescribed membership, must be "outwardly" manifested by overt acts. (id, at 411).
5. The standard to be applied to the terms "affiliated," "support" and "illegal and unconstitutional means" is not to be abstract, but is to be determined by "the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important." (at 412).
6. The statute applies only to acts done "with knowledge" that they contravene the statute. (at 413).
7. The act is not concerned with *"past actions"* (at 413), (emphasis in original). "Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in 9(h) is not a bar . . . to resumption of the position" (at 414).

Thus, under a constitutional construction of 159(h),

the following minimum requirements must be met by an indictment charging a false affidavit:

1. Allegations concerning "affiliation" and "support" are not to be abstract or bare; they must be factually stated, alleging the overt acts, so as to meet "the practical criterion of fair notice."
2. The indictment must be narrowly drawn so as to reach only the "noxious ideology" of forcible overthrow (*Kendroff v. St. Nicholas Cathedral,* 344 U.S. 118); it may not reach "all manner of social, economic, moral and political issues" (339 U.S. at 410).
3. It must state the facts showing the probability of political strikes arising from the conduct of the defendant.

(b) The crux of the Second, Fourth and Sixth Counts is the bare charge of "affiliation."[3]

To the extent that "affiliation" contemplates something other than membership, which is the basis of the First, Third and Fifth Counts (which it must, since otherwise the First and Second Counts, Third and Fourth Counts, and Fifth and Sixth Counts, would be redundant) it is so vague, uncertain and indefinite as to set no intelligible standard of prescribed conduct and to give no fair or adequate notice of the offense charged.

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[3] It may be noted in passing that whatever "affiliation" may mean, it necessarily embraces a relationship which has incidents and concepts which are different from "membership." Cf. *Bridges v. Wixon,* 326 U.S. 135, 89 L.ed. 2103. Consequently the First and Second Counts are repugnant and cannot stand together as we show below.

The term "affiliated" is of "dubious scope." Frankfurter, J., in *Douds, supra,* at 420. No definition of the term is contained in the statute, nor does any clear definition appear from the committee reports or the legislative debate. The limited judicial discussion of the term affords no guide. The leading case of *Bridges v. Wixon*, 326 U.S. 135, 89 L.ed. 2103, turned on a *statutory* definition under the immigration statutes. And even with the guidance of that statute—which defined affiliation as including those who contributed money or anything of value to an organization which advocated forcible overthrow — the court could not define the term except as importing something "less than membership but more than sympathy" (326 U.S. at 143)[4]. Judge Major, in his dissent in *Inland Steel Co. v. National Labor Relations Board,* 170 F.(2d) 247, said of the discussion of the term "affiliation" in *Bridges* "that its meaning would be quite beyond the reach of the ordinary citizen." In *United States ex rel Kettunen v. Reimer,* 79 F.(2d) 315 (CCA 2), Judge Chase refused to give a comprehensive definition of "affiliation" as used

[4] In the proceedings under review in *Bridges,* Dean Landis had reached one definition of "affiliated," Judge Sears another, only to be reversed by the Board of Immigration Appeals, which was in turn reversed by the Supreme Court, which held that the Attorney General had given the term "a looser and more expansive meaning than the statute permits." In view of the sharp disagreement concerning the meaning of the term among men who are specialists in language, even with the assistance of a statutory definition, the uncertain and indefinite nature of the term "affords little more than a fertile field for speculation and guess." Major, J., at 170 F.(2d) 247, 262.

in the deportation statute, saying: "Very likely that is as impossible as it is now unnecessary."

Under these circumstances observance of the injunction in the prevailing opinion in *Douds* that the term is to be judged by the "particular context" in which it is employed and by the "practical criterion of fair notice" to those to whom it is directed is imperative. Standing alone, it has no meaning by reason of the diverse meanings which may be attributed to it.

Under this indictment the charge of affiliation is made in no context. The indictment affords not the slightest hint as to the meaning or application attributed to it by the grand jury or as to what the defendant is called upon to meet. But under *Douds* the charge of "affiliation" must be defined and the defendant must be informed as to what conduct of his, in the Government's view, constituted "affiliation." The indictment must also charge that the defendant knew that such specified conduct constituted "affiliation." In the absence of such allegations the charge of affiliation is a mere "abstraction" which *Douds* holds is insufficient.

Such a general charge does not inform the defendant of that with which he is charged or enable him to prepare his defense. As the court said in *Fontana v. United States,* 262 Fed. at 286:

> ". . . when one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts upon which the pleader founds his charge, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the

defendant is innocent of it and has no knowledge of the facts charged against him in the pleading."

It is impossible to ascertain from the indictment the meaning of the charge of affiliation or what acts comprised such affiliation. But for an indictment to be sufficient, "the facts must be set forth, so that the court can determine, and not the pleader, whether or not they constitute the crime." *Fontana v. United States, supra,* at 288. Facts must appear *from the indictment* which "will, if proved, support a conviction for the offense alleged." *Cruikshank,* 93 U.S. 542, at 559. Here, however, only the conclusion of the pleader is stated.

It cannot be suggested that this indictment gives to the accused adequate notice in a criminal case of that which he is charged. If the status of affiliation is definable, or was intended by the grand jury to convey a meaning, it should have been defined in the indictment by a statement of the facts claimed to create the status. If it is undefinable it is ineffective to allege an offense. Thus under either alternative, whether undefinable or definable but undefined, this count is invalid. *United States v. Cohen Grocery Co.,* 255 U.S. 81, 65 L.ed. 516; *Lanzetta v. New Jersey,* 306 U.S. 451, 83 L.ed. 888; *Winter v. New York,* 333 U.S. 507, 92 L.ed. 840; *Cline v. Frink Dairy Co.,* 274 U.S. 445, 446; 71 L.ed. 1146; *International Harvester Co. v. Kentucky,* 234 U.S. 216, 221; 58 L.ed. 1284; *Champlain Refining Co. v. Corporation Commission,* 286 U.S. 242; 76 L.ed. 1062; *United States v. Cardiff,* 344 U.S. 174; *United States v. Capital Traction Co.,* 34 App. DC 592; *United States v. Hatau,* 43 F.Supp. 507.

(c) The present indictment is based upon the False Statements Act.

("... makes or uses any false writing or documents ..." (18 U.S.C. 1001)) and not the perjury statute ("... states or subscribes any material matter which he does not believe to be true ..." (18 U.S.C. 1621)). Thus, the territorial jurisdiction of this court in this case is based solely and only upon the three acts of filing the affidavits referred to in the indictment. *United States v. Valenti,* 207 F.(2d) 242; *United States v. Lombardo,* 241 U.S. 73, 60 L.ed. 897.

The making or filing of a single false writing or document can constitute but one offense, regardless of whether one or more false statements are therein contained. *United States v. Eisler,* 75 F.Supp. 634 (D.C., D. Col. 1947); *United States v. Manton,* 107 F.(2d) 834 (CCA 2); *Frowerk v. United States,* 249 U.S. 204, at 210, 63 L.ed. 561; *Magon v. United States,* 260 Fed. 811; *Anderson v. United States,* 269 Fed. 65. Each false statement does not and cannot constitute a separate offense under a single filing sufficient to support a separate count, since the jurisdiction over the offense arises from the filing and not from the false statements. *In re Snow,* 120 U.S. 274; *Kerr v. Squier,* 151 F.(2d) 308 (CCA 9); *Johnson v. Lagomorosino,* 88 F.(2d) 86 (CCA 9); *Braden v. United States,* 270 Fed. 441 (CCA 8); *Colston v. Johnston,* 35 F.Supp. 317 (DCND Col.); *Fawick Airflex Co. v. UERMWA,* 93 N.E.(2d) 480, 154 Ohio State 206; *People ex rel. Amarante v. McDonald,* 100 N.Y. Supp.(2d) 463; *Maxwell v. Rives,* 11 Nev. 213.

The vice of this indictment's effort to manufacture six offenses out of but three is aggravated by the inconsistency among the counts. As noted, the first count charges a status and relationship vis a vis the Communist Party incompatible with the status and relationship alleged in the second count.

Under any circumstances the law frowns upon and forbids splitting a single offense into multiple offenses. On the contrary it insists that simultaneous, unified conduct be treated as one offense, as in the classic examples of the theft of a flock of sheep or of a bag containing many pieces of mail. *Kerr v. Squier, supra; Johnston v. Lagomorosino, supra; Braden v. United States, supra.* Such a multiplication of offenses is oppressive under any circumstances; it is more so where the counts are inconsistent and incompatible as they are here. A single offense can no more be split into several counts than could a single offense be split into several indictments. Rule 8 of the Federal Rules of Criminal Procedure permits the joinder in separate counts in one indictment of "two or more offenses." There is no authority for assorting one offense in two counts, or three offenses in six counts. Cf. *United States v. Goldstein,* 168 F.(2d) 666 (CCA 2); *State v. Brinkley,* 354 Mo. 337; 189 S.W.(2d) 314; *Smith v. State,* 198 Ind. 70, 152 N.E. 277; 48 C.J. pp. 885-886.

The indictment at issue is wholly insufficient. It is utterly uninformative; it does not even meet the elemental requirements of pleading under the False Statements

Act by its omission of allegations of materiality of scienter. It is multiplicitous and inconsistent. It ignores the construction imposed by *Douds* to save the Act from constitutional infirmity. Further it makes vague and undefined charges which are invalid under the Fifth Amendment; it makes such charges abstractly without regard to the criterion of fair notice in a practical context and as though *Douds* had never been written.

It suffices to say that what has been said heretofore provides the substantive basis for the motions for discovery and for bill of particulars.

The Government's argument is to the effect that defendant is not entitled to know the Government's case, but as BARRON points out in his Federal Practice and Procedure, Vol. 4, page 125:

> "This, of course, works no harm to the habitual or confirmed criminal. He already knows the Government's case. The innocent defendant is the only one harmed by such an attitude."

The defendant can, of course, in no way surmise what the Government means by "affiliation" and certainly a request addressed to the court in its discretion for particulars as to that term is not only reasonable, but absolutely necessary to a defense. It might be well to note that in the case of *United States v. Ben Gold,* in the District Court of the United States for the District of Columbia, Judge Holtzoff, an expert on rules, ordered the Government to supply a bill of particulars and also allowed an inspection and examination of certain documents.

Point II.

APPELLANT WAS DENIED A FAIR TRIAL IN THAT THE TRIAL COURT ADMITTED IRRELEVANT AND INCOMPETENT EVIDENCE PREJUDICIAL TO APPELLANT'S CASE.

The witness Harper testified directly that he had not seen the appellant at any Communist Party meetings that were restricted in their attendance to members of the Communist Party at any time after June 29, 1951, the date when the first affidavit was signed by appellant (R. 413). On cross examination Harper recollected only that he had seen Fisher in 1949 and not thereafter.

For that reason all of the testimony of the witness Harper was irrelevant. A statement that "it was very possible" appellant had been a member of the Communist Party before signing the first affidavit had no tendency to prove that he was a member when or after he signed it (R. 411-13). *Wolf v. United States,* 259 Fed. 388, C.A. 8 Cir.; *Kannann v. United States,* 259 Fed. 192, C.A. 7 Cir.; *Dalton v. United States,* 154 Fed. 461 (7th Cir.); *Colt v. United States,* 158 F.(2d) 641 (C.A. 5th Cir.); *State v. Wenzel,* 72 N.H. 396, 56 Atl. 918; *Pooley v. Dutton,* 165 Ia. 745, 174 N.W. 154.

The government did not intend to call this witness for the purposes of proving any part of the indictment (R. 385-6), but as an expert witness on the Communist Party, whose testimony would show that the Communist Party took extreme security measures to prevent the identification of its members from being known and such alleged matters as prohibitions by the party aimed at preventing more than two or three members from

meeting together. Originally, the court sustained appellant's objections to Harper's testifying as such an expert, but did permit questions as to the size of the Communist Party meetings held during different years (R. 387). The court, however, refused to allow the government to prove any Communist Party "policy" with respect to the signing of non-Communist affidavits (R. 388-398, 399-407). The witness then placed the appellant at a meeting on January 1, 1949, at the Frye Hotel, in Seattle, allegedly "an enlarged District Committee meeting of the Communist Party" (R. 409). (Presumably, this was the same meeting referred to by Harley Mores as having taken place in December, 1949 (R. 107). After the testimony concerning this alleged meeting, the witness was asked by the government whether or not he had seen the defendant at any Communist Party meetings after that date, i.e. Jan. 1, 1949, and answered:

> "A Well, actually I do not remember. I don't recall whether I seen him since then or not at meetings because—may I explain?
>
> Q Yes."

Counsel for appellant objected, and the record reads as follows:

> "Mr. Etter: Well, now, I think the question is answered without any explanation, whether he seen him. He said he didn't think he saw him since.
>
> The Court: I think he may explain the answer. You might proceed. If there is some objectionable feature to the answer, counsel may interject an objection.
>
> A It is very possible that I have seen Mr. Fisher

at other meetings, but during that time, there was such high security measures taken in the Party and only three people were supposed to meet at a time, and it made it very difficult for quite a number of people to get together anywhere in one place, so, without being definite on it, I don't recall at the moment, to be definite, of seeing Mr. Fisher after that particular meeting.

MR. ETTER: I move that all that be stricken. The statement like 'It is highly possible something may have occurred,' in a trial of this kind—

MR. HARRIS (Interposing): Could I ask one more question before your Honor rules?

MR. ETTER: No, it is highly prejudicial that it is highly possible that something may have occurred. It is speculating and guessing.

MR. HARRIS: I have asked just for—

THE COURT (Interposing): Well, he stated he did not actually recall seeing him since and he wished to qualify it by some explanation. I don't think it should necessarily be stricken.

MR. ETTER: He said it was highly possible. I submit that there is highly prejudicial, a statement of that kind in this case. It doesn't constitute direct testimony, that it is highly possible a man did something.

THE WITNESS: Your Honor—

THE COURT (Interposing): The conclusion of 'highly possible' I think might be—the word 'highly' I think might be stricken. I think the word 'possible' might remain. The Court will strike that, because it is the conclusion or type of description of 'possible' that I think is improper, but I would only strike that portion of his answer, that word 'highly.'

By Mr. Harris:

Q Do you want to explain something further in that answer?

A Yes, may I?

Q I am going to ask, if there is further explanation, will you give it, please?

A Yes. Why I said—answered it like I did is because there is another meeting since then.

The reason I said 'possible' is that there was a District Committee meeting since then which was a Convention, and I am not too sure whether I saw Mr. Fisher or not. It is possible that I did see him there. I am not sure.

Mr. Etter: I object. That isn't responsive to any question. That is not a further explanation, and I think it should be stricken.

The Court: The question is whether you have seen him subsequently, and the witness is giving his best recollection, and it is a question for the jury to determine what the weight of that answer is, and the Court will deny any motion to strike."

Thus, the witness Harper was allowed to speculate before the jury and to have such speculation considered by the jury with reference to the main facts in issue, namely, whether or not appellant attended meetings which were limited in attendance to members of the Communist Party after he had signed the Taft-Hartley non-Communist affidavit the first time.

The general rule with respect to such type of testimony is that knowledge need not be positive or absolute and a belief or impression based upon observation that signifies the degree of positiveness or a witness is admissible. On the other hand, as stated by Wigmore,

"What the courts repudiate then is a mere guess, the exercise of the imagination, a system, a conjecture, offered in place of the results of actual personal observation; it is from this point of view only that a "belief" or "opinion" or "impression" is not to be received.

In connection with this statement of the rule observe the testimony quoted above in which the witness states, "Actually, I don't remember." The witness asks as a further answer to the statement that he did not remember, "May I explain?" Counsel for defendant then objected on the ground that the question had been answered without any explanation, the court overruled the objection, and the witness then made the highly objectionable statement referred to that it is "very possible that I have seen Mr. Fisher at other meetings," under the guise of an explanation that he did not remember.

Point III

THE TRIAL COURT EXCLUDED RELEVANT EVIDENCE OFFERED BY APPELLANT

A. Exclusion of Proof of Receipts for Money Received from F.B.I. by Witnesses Harley Mores and Mazie Mores.

On direct examination the Government asked the witness Harley Mores "From 1942 to 1953, what in your best estimate, would be the total amount of money that you received?" The Witness: "Well, I estimated that once before at ten thousand dollars. I don't know whether that was close or not" (R. 144).

In the face of the witness's statement that he did not know the amount of money, the witness was asked on

cross examination if he had had occasion to check the amount of money received from 1942 to 1953 from the Federal Bureau of Investigation, the witness stated that he did not have any way that he could check that, whereupon appellant's attorneys demanded that the information be produced in court and submitted (R. 326).

The witness had previously testified that he was compensated only for expenses; that is, the money that he was "actually out" (R. 244 and R. 246). He also testified that each time he received money the Agent had a receipt that the witness, Mores, signed, showing the amount of money received. He stated that "When the Agent came with the money he came out with a receipt and the amount of money was already written there" (R. 248).

In this connection he denied that any phone calls were made to the Federal Bureau of Investigation Agent (R. 249). Although the witness admitted that he had figured up the amount of money prior to the Smith Act trial in May (R. 252) he also admitted that when counsel asked him at the Smith Act trial what the amount of money was that he couldn't give an answer on the amount (R. 253). Further, on cross examination, although the witness had previously testified on direct, as quoted above, that he didn't know whether ten thousand dollars "was close or not," he admitted on cross examination that ten thousand dollars was close (R. 257) and later on he had qualifiedly admitted that "that was about the amount I was paid."

It was in the face of such contradictory testimony

that counsel for appellant demanded the actual receipts. The matter was argued before the court (R. 329-341). The court's ruling was based on the contention that the receipts which had been signed by the witness were confidential documents (R. 333) and counsel for appellant demanded at least an inspection of the documents to determine "the method, mode and extent of payment" (R. 333-334).

The final ruling of the court was that the Government might supply a certification as to the total amount paid to the witness, Harley Mores, and that it was "not sufficient reason" to justify the court to require the Government to disclose these records of the F.B.I., they being under the order of the Attorney General declaring them, and the statute declaring them, would be confidential documents.

Counsel for appellant made additional objections and excepted to the rule (R. 369-371). The Government did produce a court certification showing sums of money received by the witness, Harley Mores, and totaling more than ten thousand dollars (X. 105 and R. 748). The exhibit was offered into evidence by the defendant without waiving defendant's objections previously made to the failure to produce the actual receipts (748-749).

The certification thus offered into evidence was merely a summary of the amounts received and did not show any breakdown into actual payments made so that it was impossible to verify the authenticity or correctness of the calculations, and although defendant does not contend that the figures were not accurate as

far as they went it is almost certain that the actual receipts would have proven conclusively that the witness, Harley Mores, was not paid on the basis of expenses but was paid actual sums of money for his testimony and that the amount of his compensation actually depended upon the type of disclosures and the testimony that he was willing to give.

It is submitted that there was no possible justification for refusing admission of receipts under the guise that such receipts were confidential, since it is submitted the receipts would have impaired the credulity of the witness's testimony and would have been of the highest relevance with respect to the bias and interest of the witness since that witness undoubtedly was within the rule requiring cautionary instructions to the jury when the amount paid to such witness, or the extent of his pay, depends on the extent of his employment, and the extent of his employment depends on the discoveries he is able to make.

As we have shown in the cases cited, under Point 4 (infra) with respect to such a cautionary instruction the matter of compensation was of the greatest importance and the refusal to submit the receipts was prejudicial error.

The admissibility of all the facts and circumstances connected with the compensation of a witness has been universally recognized. With respect to showing the bias of a witness it is stated in Wigmore than such facts "may be offered either by extrinsic testimony or by

cross-examination, without discrimination against the former" (III Wigmore on Evidence, Sec. 948, p. 498).

In Section 949 of Wigmore (*supra*) in discussing "the range of external circumstances" from which bias may be inferred it is stated that "the relation of employment present or past is usually relevant," and this is reiterated in Section 969 wherein it is stated that: "The circumstances which give to a witness an interest in the event of the cause and may therefore be suggestive of testimonial doubt or detraction have usually a significance so apparent that it is either idle to dispute or useless to maintain their admissibility."

B. The Exclusion of the Testimony of Richard Harris to show prior Inconsistent Statements of the Witness Harper.

As was pointed out in Point II, the Government did not intend to call the witness Harper for the purpose of proving any material part of the indictment but as an expert witness of the Communist Party (R. 385-386). Although the court ruled out the testimony of Harper as an expert witness he nevertheless permitted the witness Harper to testify to many irrelevant, immaterial and prejudicial matters (See Point II, supra).

At the commencement of the defendant's case the court was informed of the intention to call the Assistant United States Attorney Richard Harris as a witness to testify that based upon his conversation with the Government's witnesses he knew that Harley Mores was the only witness "showing Mr. Fisher's implication in this case."

The testimony of Mr. Harris was further offered to "impeach" the testimony of the witness Harper with respect to his knowledge of the defendant and particularly with respect to his testimony about having informed the Government of all his knowledge some two weeks before, "and then only again immediately prior to the case, which he described to the jury, ..." (R. 697-698).

It is submitted that this is particularly important to the defendant in that the witness Harper, after his testimony as an expert witness had been excluded, was allowed to speculate and to state "It is very possible that I have seen Mr. Fisher at other meetings," when, as defendant offered to prove that same witness had informed the Assistant District Attorney immediately prior to trial that he could not implicate the defendant, Fisher, directly. The testimony is further significant in view of the fact that Mazie Mores was called as a witness to implicate the defendant and to show that the Assistant District Attorney had been informed that she could not implicate the defendant.

Although it is true the witness Harper and the witness Mazie Mores's testimony was very vague and did not directly implicate the defendant, in fact as has been shown their actual knowledge was such that the Government did not intend to call them as witnesses, nevertheless their testimony did create a prejudice which could have been partially corrected by the relevant testimony of the Assistant District Attorney showing such prior inconsistent statements.

C. The Trial Court Erred in Excluding Proof of Harper's Prior False Identifications under Oath in a Case Involving Communist Party Membership.

During a cross examination of the witness Harper, the witness admitted that he testified under oath before a Justice Department Security Board on October 20, 1954. The witness was then asked:

> "Q And you there identified, or, rather, that was a hearing involving a Federal employee, was it not?
>
> A That is right.
>
> Q And you had reported that you knew this employee to be a member of the Communist Party, and to have attended meetings?
>
> A No, I didn't.
>
> MR. HARRIS: Just a moment. I will object. I don't see the materiality, Your Honor, in this case.
>
> THE COURT: I am inclined to sustain the objection unless there is some further showing."

By the fact that the court sustained the objection it appeared that defendant's counsel was precluded with reference to that entire line of testimony whereupon defendant's counsel made an offer of proof proposing to show that the said hearing and while testifying under oath concerning a particular Federal employee whom he had seen twice in the same year prior to the hearing, and while under oath for the purpose of identifying him had, on two successive occasions, identified the wrong man as being the one he claimed to be a Communist Party member. The court indicated that there was no foundation for such questions. This was agreed to by counsel for defendant, saying that he wanted to lay the proper foundation but that this had been ob-

jected to (R. 465-6-7). The purpose of the questioning was explained to the court as showing the witness's powers of observation and identification and, secondly, for purpose of impeachment.

As counsel pointed out, there is a specific implication from the testimony of the witness that, he being a member of the Communist Party over a long period of time, and having attended more than a thousand closed Communist Party meetings at which nobody but Communists were present, he leaves the definite impression with the jury that because of his vast acquaintance and close intimate association with the functionaries and members of the Communist Party that when he refers to somebody as having been at a meeting and having been a Communist that he knows whereof he speaks.

In order to rebutt this impression and the testimony in the instant case it was certainly proper to show that in a similar case involving the identification of a person as a member of the Communist Party that the witness Harper had "not only a faulty memory, but a false memory" (See R. 477-484).

Counsel for the defendant also pointed out that the prior false testimony of the witness would go to show his motive in testifying in the instant case and certainly if the witness, who was a paid witness, testified falsely on three prior occasions that this would go to show a false and bad motive if not considered merely poor recollection.

After argument of counsel the court permitted defendant to again submit a question relating to the subject matter to the witness, sustained an objection to the question (R. 514-515) and permitted an offer of proof (R. 517-522).

Point IV

THE JURY WAS ERRONEOUSLY INSTRUCTED

A. The Perjury Rule Should Have Been Recognized and Applied by the Court in Its Instructions.

The court, when it instructed the jury with respect to the quantum of proof required in this case, stated as follows:

> "Now, there are two cases of evidence—direct or positive, on the one hand, and circumstantial on the other.
>
> "Direct or positive testimony is that which a person observes or sees, or which is susceptible of demonstration by the senses.
>
> "Circumstantial evidence is proof of such facts and circumstances concerning the conduct of the parties which conclude or lead to a certain inevitable conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in a criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence, and inconsistent with every other reasonable hypothesis except that of guilt, and when circumstantial evidence is of such character circumstantial evidence alone, without any direct testimony at all, is sufficient to convict. You will review all of the circumstances in the light of this instruction." (R. 843-844)

Appellant excepted to this instruction (R. 863-864) and requested the following instructions from the court:

> "A. The Government must establish the alleged falsity of the statements made by the defendant by

the testimony of two independent witnesses or by one witness and corroborating circumstances. Unless this has been done with respect to each count, you must find the defendant not guilty with respect to that count."

"B. You cannot find the defendant guilty if the proof of falsity of the affidavit is merely circumstantial."

"C. If the falsity of any statement is supported by the testimony of only one witness with evidence of corroborating circumstances, you must find the defendant not guilty unless the corroboration is by proof of independent and material facts and circumstances tending directly to corroborate the testimony of the witness for the prosecution; and such proof must be of a strong character and not merely corroboration in slight particulars. Furthermore, the testimony of the prosecution's witness must, or you cannot find the defendant guilty, contradict in positive terms the statement of the defendant.

"As I have instructed you the plaintiff, government, must establish the falsity of the statements alleged to have been made by the defendant under oath by the testimony of two independent witnesses or by the testimony of one witness and corroborating circumstances. Unless that has been done, you must find the defendant not guilty.

"Two elements must enter into a determination by you that the corroborative evidence is sufficient or actually exists. The first element is that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged false, fictitious or fraudulent statement. The second element is that the corroborative evidenced is trustworthy."

The perjury rules should have been applied.

Unique rules of evidence apply in perjury cases. The falsity of the statement must be proved by direct evidence, and circumstantial evidence alone cannot support the conviction. The direct evidence must be the testimony of two witnesses or of one witness supported by strong corroborating evidence. If the evidence is not of such a character, the trial judge must not permit the case to go to the jury; and in any event the jury must be instructed that these rules must be satisfied. *United States v. Wood,* 14 Pet. (39 U.S.) 430, 441; *Hammer v. United States,* 271 U.S. 620; *Weiler v. United States,* 323 U.S. 606; *United States v. Otto,* 54 F.2d 277, 279 (2d Cir.); *Clayton v. United States,* 284 Fed. 537, 539 (4th Cir.); *Radomsky v. United States,* 180 F.2d 781, 782 (9th Cir.); *Phair v. United States,* 60 F.2d 953 (3d Cir.); *United States v. Palese,* 133 F.2d 600, 602 (3d Cir.); *Allen v. United States,* 194 Fed. 664 (4th Cir.); falsity of the statement must be proved by direct evi- *McWhorter v. United States,* 193 F.2d 982 (5th Cir.); *United States v. Goldstein,* 168 F.2d 666 (2d Cir.); *United States v. Remington,* 191 F.2d 246, 249 (2d Cir.) cert. den. 343 U.S. 907; *United States v. Neff,* 212 F.2d 297, 306-308 (3d Cir.).

In the present case, the trial court refused to give the standard perjury instructions, requested by appellant.

Although this case was not brought under the perjury statute, the issue which had to be proved, and which the government sought to prove, was that the appellant had sworn falsely under oath when he executed the (9)(h)

affidavit. This alleged false swearing was perjury. 18 U.S.C,. sec. 1621.

The question then is whether the perjury rules of evidence apply only in a prosecution under the perjury statute or whether they also apply in other criminal cases in which the issue is whether perjury was committed. On principle and under the authorities the question must be answered in the affirmative.

The special rules relating to the proof of perjury had their origin in the ecclesiastical courts. 7 Wigmore on Evidence (3d ed. 1940) sec. 2032; *United States v. Robinson,* 259 Fed. 685, 694 (S.D., N.Y.). Unquestionably they reflect the special religious or supernatural significance which has attached since primitive times to the ceremony of oath-taking and to the importance of keeping an oath.[5] Accordingly, the doctrine evolved that any man's oath is as good as another's, and perjury cannot be proved by oath against oath. Wigmore, loc. cit.

The perjury rule has survived into modern times because experience has demonstrated that it conforms to the needs of modern society. It is a necessary protection against spiteful and unfounded prosecutions, *United States v. Nessanbaum,* 205 F.2d 93, 95 (3d Cir.), and "implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted." *Weiler v. United States,* 323 U.S. 606, 609.

[5] *Cf.,* the Ninth Commandment and Psalms xxiv: "Who shall ascend unto the Mountain of the Lord? And who shall stand in His holy place? He that hath clean hands, and a pure heart; Who hath not taken My name in vain, And hath not sworn deceitfully."

In the present case the issue was whether appellant had made a false sworn statement. The case therefore is within the historic rationale of the perjury rule, which was based on the special quality of an oath. The case is likewise within the modern rationalization since the danger of harassment or conviction of the innocent on unreliable testimony is the same as if the case had been brought under the perjury statute. This fact is vividly demonstrated by the quality of the government's witnesses—professional informers in the pay of the prosecution whose lack of respect for the truth and penchant for making unfounded accusations are shown in this record.

As to precedents, *Hammer v. United States,* 271 U.S. 260, establishes that the perjury rules of evidence apply whenever false swearing is an issue in the case and not merely in perjury prosecutions. Hammer held that the perjury rules governed proof of the false statement in prosecutions for subornation of perjury.[6] The court stated (at 629):

> "The rule that the uncorroborated testimony of one witness is not enough to establish falsity applies in subornation as well as in perjury cases. * * * Falsity is as essential in one as in the other. It is the *corpus delicti* in both."

So in the present case, the falsity of the sworn state-

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[6] Where the charge is soliciting the commission of perjury, the offense is complete without the taking of an oath. Since the theory of oath against oath is therefor not involved, it has been held that the perjury rules do not apply. *Culwell v. United States,* 194 F.2d 808 (5th Cir.).

ment was "as essential" as in a perjury prosecution, and the falsity was as much the *corpus delicti.*

Other cases bear out the principle of *Hammer,* that it is not the form of the action which calls the perjury rules into play, but whether false swearing is the matter to be proved. Thus the perjury rules must be applied even in civil cases where the issue is whether a person swore falsely—the typical case being an action for slander in which the defendant seeks to justify as true his statement that the plaintiff committed perjury. *Woodbeck v. Keller,* 6 Cow. (N.Y.) 118; *Clark v. Dibble,* 16 Wend. (N.Y.) 601; *Spruil v. Cooper,* 16 Ala. 791; *Laughran v. Kelly,* 8 Cush. (62 Mass.) 199, 202; *Coulter v. Stuart,* 2 Yerg. (Tenn.) 225.[7] So in *Woodbeck v. Keller,* the court stated (at 119-120):

> " * * * where, in an action of slander, a defendant justifies a charge of perjury, one witness is not sufficient to prove the truth of the charge, and sustain the justification. * * * Upon an indictment, the rule is well established and undisputed * * * and no ground of distinction is perceived, between the two cases. * * * And if, in (a criminal prosecution for perjury) the oath of the defendant is to be considered equivalent to the oath of a witness, why should not a like effect be given to it in a civil prosecution?"

Todorow v. United States, 173 F.2d 439 (9th Cir.), cert. den. 337 U.S. 925, is not to the contrary. There the

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[7] But through the direct-evidence, two-witness rule applies even in such civil cases, the one seeking to prove the falsity need not meet the criminal standard of establishing his case beyond a reasonable doubt. *Spruil v. Cooper, supra.*

court stated in a prosecution under the false-statement act, "There is no sound reason for invoking the perjury rule here." In *Todorow,* the charge was that the defendants had caused one Taylor to make false statements to a government agency. It does not appear that Taylor's statements were under oath. Moreover, the falsity of Taylor's statement was not disputed, and the only question in issue was whether the defendants had induced the statements. As the court stated (at 443-4):

> "We are not called upon to sustain a finding that statements were false on the sole basis of 'an oath against an oath.' It was not disputed that Taylor made false representations in his application."

In *Todorow,* therefore, the court was merely applying the familiar rule that the perjury rules apply only to proof of the falsity of the statement, and not to proof of other matters, such as whether the statement was in fact made or induced.

B. The Court Did Not Give a Precautionary Instruction as to the Testimony of Professional Informers.

The court instructed the jury as follows:

> "The evidence shows that certain of plaintiff's witnesses were in times past engaged by the government to join the Communist Party and make reports to the Federal Bureau of Investigation of such facts as they learned during such association; also that they were paid considerable sums of money while so engaged. In weighing the testimony of such witnesses in this case you should scrutinize their testimony with care and caution and after so considering their testimony give it just such weight as you believe it to be entitled to in view of all the

circumstances of the case as disclosed by the evidence. If you find they have testified truthfully such testimony is as good as the truth testified to from any other source." (R. 845-846)

The appellant excepted to the court's instruction and stated that the instruction was incomplete and not sufficiently cautionary. The appellant's instruction No. 5 (CTr. 23) should have been given.

"The testimony of the witnesses who were at the time of their testimony in the employ of the Department of Justice or who were paid directly for their testimony in this case must be examined with greater scrutiny and care than the testimony of an ordinary witness for the purpose of determining whether such testimony is colored in such a way as to place guilt upon a defendant in furtherance of the witness's own interest."

Harper and Mores, the two government witnesses, were Communists and they were paid special fees as informers.

The trial court refused to instruct the jury that the testimony of witnesses who were in the employ of the Department of Justice or who were paid directly for their testimony "must be examined with greater scrutiny and care than the testimony of an ordinary witness."

It is elementary that the testimony of the hired spy or informer should be received and employed with great caution. "(W)hen the amount of his pay depends upon the extent of his employment, and the extent of his employment depends upon the discoveries he is able to make, then that man becomes a dangerous instrument."

Sopwith v. Sopwith, 4 Sw. & Tr. 243, 247, 164 Eng. Repr. 1509. See also 2 May, Constitutional History of England (1863) 275-279. Even where a case is tried to the court without a jury, the testimony of such witnesses, "like that of all questionable witnesses, should not only be most carefully scrutinized, but received with great caution and reserve." *Allen v. Allen,* 52 App. D.C. 228, 231, 285 Fed. 962; *District of Columbia v. Clawans,* 300 U.S. 617, 630; *Moller v. Moller,* 115 N.Y. 466, 22 N.E. 169; *People v. Loris,* 131 App. Div. 127, 115 N.Y.S. 236. The character of the informers in this case and elsewhere amply justifies this skepticism. See Donner, The Informer (1954) 178 Nation 298.

When this case went to the jury appellant was entitled of right to have the requested cautionary instruction given. *Fletcher v. United States,* 81 App. D.C. 306, 158 F.2d 321; *McGinniss v. United States,* 256 Fed. 621 (2d Cir.). See also *Kelly v. United States,* 90 App. D.C. 125, 194 F.2d 150; *Gassenheimer v. United States,* 26 App. D.C. 432. Here, as in *Fletcher* and *McGinniss,* the entire case against appellant depended upon the testimony of professional hired informers.[8] And the need for a cautionary instruction was even greater here than it was in *Fletcher* and *McGinniss.* Informer testimony is, of course, more readily falsified than factual testimoney since it is less susceptible to cross-examination and rebuttal. Moreover, public opinion currently tends

[8] Hence the case is unlike *United States v. Dennis,* 2 Cir. 183 F.2d 201, aff'd 341 U.S. 494, and *Richardson v. United States,* 208 F.2d 41, cert. den. 347 U.S. 1018, where there was documentary corroboration.

to assign to the political informer an undeservedly high veracity count.[9]

C. The Court Erred in Giving the Instructions Relating to "Membership" and "Affiliation."

That instruction was as follows:

"Now, certain of the terms or words of the indictment and statute here involved I will now define or explain to assist you in relating the evidence to the law of this case.

"As used in the indictment and statute the words 'member' and 'affiliated,' when applied to the Communist Party, have no unusual or different meaning apart from their normal or common usage.

"Webster's New International Dictionary defines 'member' as follows:

" 'One of the persons composing a society, community, or party; an individual who belongs to an association.'

" 'Affiliate' is defined as follows:

" 'To connect or associate one's self with; to

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[9] Curiously enough, the political informant, spy or agent provocateur is not now regarded with the same opprobrium as his brother who participates in other types of crime. Public opinion being what it is, his credibility is at a premium. His veracity count exceeds that of his more orthodox and less eccentric fellows. He may admit to all kinds of past knavery and mendacity but the greater his self-debasement the greater his claim to belief. That he now acts from patriotic motives is conclusively presumed." Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs (1951) 60 Yale L. J. 1091, 1126. See also Chafee, Spies into Heroes, 174 Nation 618 (1952); Golat, The Informer: His Role in the Breakdown of the Government (1954) 77 N.J.L. No. 37, p. 1.

adopt, hence usually to bring or receive into close connection; to ally.' " (R. 853-854)

The appellant excepted to the court's instruction and to the failure to give his requested instruction No. 10, on the ground that the instruction given was and is now a proper definition of the term included therein, particularly because such definition as the court included did not and do not conform to the meaning intended in the Taft-Hartley act, as shown by the legislative history of the act; and on the further ground that the instruction of the definition given by the court was so vague and indefinite as to furnish the jury with no ascertainable standards of guilt.

The appellant's requested instruction was as follows:

"With respect to Counts I, III, and V it is necessary that I instruct you in the meaning of the phrase 'member of the Communist Party.'

"A. Membership in the Communist Party is a formal relation between an individual and the Communist Party which is defined by the rules and regulations of the Party.

"B. Not every relationship between an individual and an organization constitutes membership. An individual may be sympathetic or agree with all or part of the program of an organization and co-operate actively with it and still not be a member.

"C. In the present case you have had introduced in evidence the constitution of the Communist Party. In order for you to find that the defendant was a member of the Communist Party on June 29, 1951, as alleged in Count I of the indictment you must find beyond a reasonable doubt that, as of

that date, the defendant satisfied the requirements of membership as set forth in the Constitution of the Communist Party.

"D. In that connection I instruct you that the provisions of that constitution set forth as conditions of membership that a member is one who 'accepts the aims, principles, and program of the Party, as determined by the constitutions and conventions, who holds membership in and attends club meetings, who is active on behalf of the Party, who reads the Party press and literature and pays dues regularly.'

"E. In order to find that the defendant is guilty of the charge in Count I, you must find that the conditions of membership as set forth in the Constitution were true on June 29, 1951, and that on that date the defendant believed that these conditions obtained, and believed that he formally was a member of the Communist Party. If you do not find beyond a reasonable doubt that the defendant regularly paid dues, attended meetings, and accepted the program of the Communist Party on June 29, 1951, or if you do not find beyond a reasonable doubt that the defendant considered himself to be a member of the Communist Party at the time he signed the affidavit, then it is your duty to acquit as to said Count I.

"F. The same rules apply in determining the guilt or innocence of the defendant with respect to Counts III and V of the indictment with respect to membership in the Communist Party." (Tr. 23)

Membership in an organization which has formalized requirements for membership is determined by the prescribed requirements. That was the exclusive test em-

ployed in *United States v. Reimer,* 79 F.2d 315 (2d Cir.), in determining membership in the Communist Party. It was the sole test employed also in *Kubilius v. Hawes,* 322 Mass. 638, 79 N.E.2d 5, and *State v. Vrowell,* 9 N.J.L. (4 Halst.) 390, in determining church membership, and in *Traders' Mutual Life Ins. Co. v. Humphrey,* 109 Ill. App. 246, in determining membership in a fraternal order. Moreover, in *Kuilius v. Hawes, supra,* those who had failed to comply with one of the formal membership requirements specified in the church by-laws were held not to be members even though it was found that the requirement had been "commonly disregarded," in the absence of any showing that it had been waived as to the persons whose membership was in question.

The fact that there was testimony from some of the government's witnesses that it was not always necessary for a member to comply with some of the provisions of the constitution (payment of dues and attendance at meetings) does not affect the applicability of the stated principle to this case. This testimony was irrelevant in the absence of a showing that some such special arrangement had been made between appellant and the organization.

The test that membership is to be determined by the rules of the organization is also in accordance with common understanding. And since, under 18 U.S.C. §1001, "punishment is restricted to acts done with knowledge that they contravene the statute" and "no honest, untainted interpretation * * * is punishable," *American Communications Association v. Douds,* 339 U.S. 382,

413, appellant was entitled to have the jury measure the truth or falsity of his affidavit by that test. *Cf., United States v. Harriss,* 347 U.S. 612, 620; *United States v. Rumely,* 345 U.S. 41, 47.

In refusing to incorporate this test in its instructions, the court left the jury free to speculate as to the meaning of membership and to test the truthfulness of appellant's denial of membership by some definition not known to appellant.

Even if the court disagreed with the appellant as to what the proper definition of membership was, it was still necessary for the court to give the jury some definition of the term. However, the instruction which the court gave failed to define the term at all and was vague and misleading.

As defined by the court, the term is not definite enough to satisfy the requirements of specificity applied to criminal indictments. Under the court's instructions "member" became as elastic and uncertain a concept as "sympathizer," *United States v. Lattimore,* App. D.C. ....., No. 11849, decided July 8, 1954. That which will not suffice to apprise defendant, his lawyers and the court of the offense charged will not suffice to support a verdict of guilty on the charge.

Moreover, since the charge here is that appellant knowingly made a false statement in denying membership, and since the state of appellant's mind can only be shown by "outward manifestations" or overt acts (*American Communications Association v. Douds,* 339 U.S. 382, at 411), the jury should have been instructed as to those overt acts if any which they had to find in

order to infer that the appellant knew that he was a member. *United States v. Remington,* 191 F.2d 246 (2d Cir.), cert. den. 343 U.S. 907.

Having caused the jury at large to search for the intent of the appellant and of the Communist Party with respect to an undefined concept of membership, the court should at the very least have instructed the jury what not to consider. But it refused to charge that sympathy for or agreement with all or part of an organization's program, or co-operation with the organization, did not of itself constitute membership.

The House version of the Taft-Hartley Act (H.R. 3020, 80th Cong.) in 9f(6) forbade certification of a union by the National Labor Relations Board if one or more of its officers was a member of the Communist Party, "or by reason of active and consistent promotion or support of the policies, teachings and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such party." The Senate bill (S. 1126, 80 Cong.) did not contain a similar provision, but during debate on the floor Senator McCarthy proposed an amendment to permit labor unions to seek and employers to grant the discharge of a union member expelled from the union because of his "actively and consistently promoting or supporting the policies, teachings, and doctrines of the Communist Party." 93 Cong. Rec. 4879-4880. Senator Tydings objected to the quoted language as getting into a "twilight zone" so that the "examination might turn into a witch hunt" and Senator McCarthy then deleted the language objected to. *Ibid.,* pp. 4881-4882. The McCarthy amend-

ment was not agreed to (*ibid.*, p. 4884), but Senator McClellan proposed an amendment to the Senate bill incorporating the language of the House bill, and this amendment, after deletion of the word "teachings," was agreed to. *Ibid.*, pp. 4894-4895. The conference committee, which wrote the final version of the Act as it now appears in §9h, deleted the entire clause which made promotion and support of Communist Party policies evidence of Party membership or affiliation. *Ibid.*, 6361, 6364.

Because the jury was given no comprehensible definition of membership, the statute as applied to appellant violates the due process clause of the Fifth Amendment. *Lanzetta v. New Jersey,* 306 U.S. 451; *Screws v. United States, supra.* Because the jury was left free to find an essential element of the crime on evidence of appellant's beliefs, associations and advocacy which Congress cannot constitutionally proscribe, the statute as applied also violates the First Amendment. *Winters v. New York,* 333 U.S. 507.

We respectfully direct the court's attention to the argument heretofore made under the first point in this argument, which related to the failure of the indictment in its charge of "membership" and "affiliation."

Point V

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

A. The Verdict Was Not Supported by the Evidence Even Under Minimum Standards of Proof

In reviewing a denial of a judgment of acquittal the

general rule applicable is that a conviction based upon circumstantial evidence must be reversed unless the evidence excludes every other hypothesis but that of guilt, or if the evidence is as consistent with innocence as with guilt (Cyclopedia of Federal Procedure, 3d Ed., Vol. 11, Sec. 47.152).

The issue posed by the indictment was whether the appellant knowingly filed a false affidavit. The two affidavits in question, since the appellant was acquitted on the two counts which concerned the affidavit dated June 5, 1953, were executed on June 29, 1951, and July 11, 1952. The question under review, therefore, is whether the evidence supports the jury finding that on June 29, 1951, and July 11, 1952, the appellant was a member of, or affiliated with, the Communist Party.

The affidavit was in the present tense.

It is also important to stress that there was no effort made to prove the objective falsity of the affidavit with respect either to membership in the Communist Party or affiliation with the Communist Party. Although such objective falsity has been held to be the crucial fact to be proven in establishing in such a case as this that the accused "swore falsely."

Sec. 9(h) (29 U.S.C.A. Sec. 159(h);

American Communication Ass'n. v. Douds, 339 U.S. 382, 94 L.ed. 925.

See also, *cases construing the statute*:

United States v. Jennison, 26 Fed. Cas. 608 (No. 15, 475);

United States v. Moore, 26 Fed. Cas. 1304 (No. 15, 803);

United States v. Rhodes, 30 Fed. 431 (C.C. Mo.).

Cases holding that the prosecution has the burden of proving objective falsity from which to infer the accused's knowledge and intent:

United States v. Barra, 149 F.2d 489 (CA 2);

Hills v. United States, 97 F.2d 710 (CA 9);

Swisher v. United States, 109 F.2d 1000 (CA 10).

Cases showing the practice of alleging objective falsity in the indictment:

United States v. Gilliland, 312 U.S. 86, 85 L.ed. 598;

Swisher v. United States, 109 F.2d 1000 (CA 10);

United States v. White, 69 F.Supp. 562;

United States v. Hautau, 43 F.Supp. 507.

Congress has persistently distinguished between the crime of perjury (wherein the offense consists of the contradiction between the accused's oath and his belief, see *United States v. Remington,* 191 F.2d 246 (CA 2)) and the crime of filing or presenting false claims or writings such as here. The preservation of this distinction, apparent on the face of the statute in the 1948 recodification, against the background of the case law, manifests a plain Congressional intent to define in the false statement section a crime based on objective falsity of the writing or document.

18 U.S.C.A. Sec. 1621—perjury: " . . . any material matter which he does not believe to be true . . . "

18 U.S.C.A. Sec. 1001—false statement: " . . . any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry . . . "

Given the "harshness and rigor" of this statute, the court is bound to construe it so that it "will be strictly confined within, the fair meaning of its terms."

United States v. Moore, 185 F.2d 92, 95 (CA 5);

Hills v. United States, 97 F.2d 710 (CA 9);

United States v. White, 69 F.Supp. 562;

United States v. Rhodes, 30 Fed. 431.

With respect to the fact in issue in this case the court is respectfully directed to the argument of counsel on motion for a direct verdict of not guilty (R. 662-681).

In this argument appellant pointed out that membership in an organization was a matter of meeting formal requirements of membership, citing *United States v. Reimer,* 79 F.2d 315.

Kubilius v. Hawes Unitarian Congregational Church, 322 Mass. 638, 79 N.E.2d 5.

In the case at issue there is no description whatsoever of what is meant by the Communist Party although from the context of the affidavit and the necessary purpose of the affidavit the reference to the Communist Party referred to a particular organization which had been held to be inclined to foment strikes or to advocate the overthrow of the government by force and violence.

The testimony of Harley Mores: Although the crux of the Government's case was the proof of membership

in the particular organization proscribed by the statute on given dates, namely, June 9, 1951, and July 11, 1952, the testimony of the only witness bearing on that issue at all, Harley Mores, was so completely vague and indefinite on the material points in issue as to constitute no evidence at all, or at the very least certainly was so vague as to prevent a proper defense. Excerpts from this witness's testimony are set forth in the Appendix to prove this fact (Appendix, pp. 93-102).

In a case wherein the time the events occurred was of the essence, and in which the stating of the time the events occurred was essential to a defense, the witness Mores was completely unable to state such dates and consequently varied his testimony as to when events occurred from a year to seven years (R. 101, Appendix 93).

Upon the point in issue the witness, Harley Mores, was asked whether or not the defendant was a member of the Communist Party and how he arrived at that conclusion. His answer to this was as follows:

> "Well, at first I saw him at Communist Party meetings, and other members introduced me to him, and I became acquainted with him, but at the first few meetings, I don't get their names too quickly. If they introduce me to four or five or six of them, I wouldn't know the names the next day. I have to meet them several times to learn their names, and so I didn't learn his name right away, but I soon got acquainted with him." (R. 102-103)

The gist of the witness's testimony was solely based upon a conclusion that appellant was at Communist Party meetings and the contention that appellant was a member of the Communist Party was an inference

based upon the further inference that the alleged Communist Party meeting was one at which only members of the Communist Party attended, and thereby clearly assuming the point at issue. The only reference to any other evidence indicating membership in the Communist Party concerned the payment of dues and the witness's testimony in that regard referred to the year 1950 (R. 110). There was no further identification of the time, place, or circumstance of such alleged incident.

The only meetings, testified to by the witness Harley Mores, which were in the period of the indictment were the meeting on December 26, 1952, at which time the witness contended that he was receiving government exhibits 7 and 8 from the defendant and a meeting on January 17, 1953, at which time the witness alleged that he received government exhibit 9 from the defendant.

Government exhibits 7, 8, 9, were pieces of literature which upon direct examination in response to leading questions the witness claimed that he received from the defendant. The following, however, is a quotation from his identifying exhibits 7 and 8.

By Mr. Harris:

"Q Have you *ever* received any literature from the defendant?

A Right now I don't recall." (R. 116-117)

After having denied that he ever had received any literature from the defendant he then testified that he received exhibits 7 and 8 from the defendant on December 26, 1952. With reference to this meeting on December 26, 1952, the witness was unable to recall the num-

ber that attended the meeting, merely stating that it was a small meeting (R. 116). He stated with respect to exhibits 7 and 8 that the defendant requested him to "read them to some party members." He then went on to state that he was to deliver the literature to "the same house we had the committee at and to instruct him that we would have a meeting at his house in a week or two." The transcript reads as follows:

> "Q We were to have a meeting, what do you mean?
>
> A The Communist Party and Fisher and I were to be there." (R. 137)

The witness then was asked to give a date of the next meeting to which he replied, "No, I don't believe I can." However, immediately upon being shown government exhibit 9 he gave the date of the meeting as January 17, 1953 (R. 139).

It should be noticed also that immediately after the witness Mores identified exhibits 7 and 8 he was asked by counsel for the defendant, "Now, do I understand your testimony to be correct, that Mr. Fisher gave you these two exhibits for identification on December 26, 1952?" and the witness merely answered, "I *believe* so" (R. 119).

He then stated that he could remember only one other meeting after that at which the defendant had attended and stated that this meeting was held one week before the trial at which the witness had testified in May of 1953 (R. 140-141). Counsel for the Government then asked the witness directly with respect to that meeting, "Of those 7 were there any present who were not Com-

munist Party members?'' and the witness replied, ''I couldn't say it that way. There was one present that they told me hadn't belonged but her dues had been paid. I collected her dues for at least a year so I couldn't say she didn't belong. Nobody had a card.''

With respect to that meeting the witness was asked as to what was discussed with the defendant at that meeting and he replied, ''Well, there was lots of discussion went on but I don't recall just exactly.''

In each of the above instances, such constituting the only testimony at all connecting the defendant in any way with alleged Communist meetings it is obvious that the witness's description of the meeting as a Communist meeting was a matter of opinion based upon hearsay. This is further shown by his testimony with respect to one of the meetings referred to above in which he states, ''There was one present that they told me hadn't belonged.'' This clearly indicates that his testimony is based upon what he was told.

Upon cross-examination the witness was unable to repeat any of his testimony on direct. With reference to almost every question attempting to place the date to a meeting the witness would answer, ''I don't know.'' Upon direct he testified that he rode in the defendant's car (R. 109), but on cross he testified, ''I might have, I don't know'' (R. 271).

Time and space do not permit detailing the numerous contradictions. The testimony of Harley Mores is both inconsistent with itself, and at total variance with the other witnesses. Two such inconsistencies may be mentioned as illustrative.

The witness Mores volunteered the flat denial that he had ever called any government agent on the telephone in connection with his alleged undercover work (R. 243, 249). His wife on the other hand testified that her husband called the F.B.I. a "considerable number of times" on the telephone (R. 629, Appendix p. 88).

The second illustration is more than an inconsistency in that it is an example of the situation prevailing throughout the trial with respect to the date that events were alleged to have taken place. The witness Mores testified concerning an enlarged District Committee meeting at the Frye Hotel on December, 1949 (R. 107). The witness Harper referred to the meeting at the Frye Hotel as having taken place on the first of January, 1949 (R. 409). The date of the meeting is thus placed at almost a year apart.

The basic and conclusive fact, however, is that the *only meetings testified to by any witness during the period of the indictment* were alleged to have taken place on December 26, 1952 (R. 114,115,116), another meeting a short while after that at some member's home near Sultan (R. 132) and a third meeting, which was admittedly not limited to members of the Communist Party in May of 1953 (R. 134). This constitutes the only relevant testimony bearing directly on the issue involved by any witness, and this testimony might conceivably be considered relevant on the issue of whether or not appellant signed a false affidavit on June 5, 1953, however, with respect to that date, Counts V and VI, the jury acquitted the appellant.

In view of the above it follows, *a fortiorari,* that the

evidence was insufficient if the rule as to quantum of proof in a perjury case had been applied (See argument in Point IV (*supra,* p. 44)).

For the reasons stated, including all of the reasons set forth in the Statement of Points, it is respectfully submitted that the judgment of the court below should be reversed.

Dated July 7, 1955, Seattle, Washington.

R. Max Etter,
C. T. Hatten,
Counsel for Appellant.

APPENDIX

1. INDICTMENT

Count I

That on or about June 29, 1951, in the Northern Division of the Western District of Washington, Avalo Allison Fisher, alias Al Fisher, alias A. A. Fisher, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, and in accordance with Section 9(h) of the Labor Management Relations Act of 1947, did unlawfully, wilfully and knowingly use and file, and cause to be used and filed with the said National Labor Relations Board a false writing and document, namely, an "Affidavit of Non-Communist Union Officer" (Form NLRB-1081) knowing the same to contain a false, fictitious and fraudulent statement and representation, to-wit, that he, Avalo Allison Fisher, alias Al Fisher, alias A. A. Fisher, was not then and there a member of the Communist Party whereas, as the said Avalo Allison Fisher, alias Al Fisher, alias A. A. Fisher, well knew, he, Avalo Allison Fisher, alias Al Fisher, alias A. A. Fisher, was then and there a member of the Communist Party.

All in violation of Title 18, U.S.C., Section 1001.

Count II

That on or about June 29, 1951, in the Northern Division of the Western District of Washington, Avalo Allison Fisher, alias Al Fisher, alias A. A. Fisher, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, and

in accordance with Section 9(h) of the Labor Management Relations Act of 1947, did unlawfully, wilfully and knowingly use and file, and cause to be used and filed with the said National Labor Relations Board a false writing and document, namely, an "Affidavit of Non-Communist Union Officer" (Form NLRB-1081) knowing the same to contain a false, fictitious and fraudulent statement and representation, to-wit, that he, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, was not then and there affiliated with the Communist Party, whereas, as the said AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, well knew, he, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, was then and there affiliated with the Communist Party.

All in violation of Title 18, U.S.C., Section 1001.

COUNT III

That on or about July 11, 1952, in the Northern Division of the Western District of Washington, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, and in accordance with Section 9(h) of the Labor Management Relations Act of 1947, did unlawfully, wilfully and knowingly use and file, and cause to be used and filed with the said National Labor Relations Board a false writing and document, namely, an "Affidavit of Non-Communist Union Officer" (Form NLRB-1081) knowing the same to contain a false, fictitious and fraudulent statement and representation, to-wit, that he, AVALO ALLISON FISHER, alias Al Fisher, alias A. A.

Fisher, was not then and there a member of the Communist Party whereas, as the said AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, well knew, he, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, was then and there a member of the Communist Party.

All in violation of Title 18, U.S.C., Section 1001.

COUNT IV

That on or about July 11, 1952, in the Northern Division of the Western District of Washington, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, and in accordance with Section 9(h) of the Labor Management Relations Act of 1947, did unlawfully, wilfully and knowingly use and file, and cause to be used and filed with the said National Labor Relations Board a false writing and document, namely, an "Affidavit of Non-Communist Union Officer" (Form NLRB-1081) knowing the same to contain a false, fictitious and fraudulent statement and representation, to-wit, that he, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, was not then and there affiliated with the Communist Party, whereas, as the said AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, well knew, he, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, was then and there affiliated with the Communist Party.

All in violation of Title 18, U.S.C., Section 1001.

COUNT V

That on or about June 5, 1953, in the Northern Divi-

sion of the Western District of Washington, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, and in accordance with Section 9(h) of the Labor Management Relations Act of 1947, did unlawfully, wilfully and knowingly use and file, and cause to be used and filed with the said National Labor Relations Board a false writing and document, namely, an "Affidavit of Non-Communist Union Officer" (Form NLRB-1081) knowing the same to contain a false, fictitious and fraudulent statement and representation, to-wit, that he, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, well knew, he, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, was then and there a member of the Communist Party.

All in violation of Title 18, U.S.C., Section 1001.

COUNT VI

That on or about June 5, 1953, in the Northern Division of the Western District of Washington, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, and in accordance with Section 9(h) of the Labor Management Relations Act of 1947, did unlawfully, wilfully and knowingly use and file, and cause to be used and filed with the said National Labor Relations Board a false writing and document, namely, an "Affidavit of Noncommunist Union Officer" (Form NLRB-1081) knowing the same to contain a false, fictitious and fraudulent statement and representation, to-wit, that

he, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, was not then and there affiliated with the Communist Party, whereas, as the said AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, well knew, he, AVALO ALLISON FISHER, alias Al Fisher, alias A. A. Fisher, was then and there affiliated with the Communist Party.

All in violation of Title 18, U.S.C., Section 1001.

A TRUE BILL

.....

Foreman

CHARLES P. MORIARTY
United States Attorney
RICHARD D. HARRIS
Assistant United States Attorney

2. TESTIMONY OF THOMAS R. DURHAM (R77-78)

DIRECT EXAMINATION

THE CLERK: Will you state your full name and spell your last name, please?

THE WITNESS: Thomas R. Durham, D-u-r-h-a-m (spelling).

By MR. HARRIS:

Q For all of us, will you repeat it once again, your name?

A Thomas R. Durham.

Q Your address, Mr. Durham?

A 710½ North Tenth Street, Tacoma, Washington.

Q And your present occupation?

A Deputy Sheriff, Pierce County, Washington.

Q And prior to that time, what was your occupation?

A Police Patrolman for the City of Sumner, Washington.

A And, in that capacity, do you know the witness that just preceded you, Mr. Durham?

A I do.

Q And were you a Police Patrolman in June, 1950?

A I was.

Q And on that date, did you have occasion during that period—did you have occasion to see the Defendant in this case?

A I did.

Q And do you recall what day that was?

A It was in the early morning hours of June 30, 1950.

Q And you are sure of the date, is that correct?

A Yes.

Q Did you have—did you notice anything unusual about anything that was in his possession or in his automobile?

A I recall the unusual amount of the white pamphlets described by the previous witness, several of them, I would estimate there were 100, well over 100 of the white pamphlets.

MR. HARRIS: I think that is all. Your witness.

3. DIRECT TESTIMONY OF MAZIE MORES:

THE CLERK: Will you state your full name, and spell you last name, please?

THE WITNESS: Mazie Mores.

By Mr. Harris:

Q Would you state your name, please?

A Mazie Mores.

Q And what is your address, Mrs. Mores?

A Gold Bar.

Q Have you ever been a witness in a case before?

A I never have.

Q Are you the wife of Mr. Harley Mores?

A I am.

Q Mrs. Mores, have you ever been a member of the Communist Party?

A I have.

Q And when did you first become a member?

A Oh, I would judge around 1942.

Q And did you discontinue your membership when your husband took the stand, last year?

A I did.

Q Mrs. Mores, do you know the defendant in this case, Mr. Fisher?

A I do.

Q Do you see him here in the courtroom?

A I do.

Q Would you kindly indicate from there, by pointing where he is located?

A (Witness points to defendant.)

Q What color suit does he have?

A Blue.

MR. ETTER: This is Mr. Fisher. We will stipulate this is Mr. Fisher.

MR. HARRIS: Thank you, Counsel.

By Mr. Harris:

Q Have you ever seen Mr. Fisher at any Communist Party meetings?

A I have.

Q Now, did you ever have a conversation with Mr.

Fisher concerning any matters relating to the Communist Party?

MR. ETTER: I will object to that, unless you put a time and a place.

MR. HARRIS: I am trying to establish it.

THE COURT: It is a preliminary question?

MR. HARRIS: I am trying to establish that now, if your Honor please.

THE COURT: I understand. Objection overruled.

A I have.

By MR. HARRIS:

Q Have you ever had a conversation at your home with him?

A Yes, sir.

Q Do you know when it was that you had this conversation?

A No, I don't know the specific date, but it was around about three or four years ago.

Q Do you know where it was?

A Right in our living room.

Q Who else besides yourself and Mr. Fisher was present?

A My husband, Harley Mores.

Q What was said at that conversation?

A Well, he said he had been elected to some kind of office, but I couldn't say—

MR. ETTER (interposing): I will object to any conversation, if the best we can get is three or four years before.

MR. HARRIS: I think the conversation might assist in establishing that time. The dates don't always do that.

THE COURT: Your best recollection, Mrs. Mores, is three or four years ago?

THE WITNESS: Yes.

THE COURT: Can you fix a date closer, do you think?

THE WITNESS: Well, I don't hardly think I could.

THE COURT: That is your best—

THE WITNESS (Interposing): That would be my best ability, three or four years ago, because I know my little girl was just very small. That is what I was going by.

By Mr. Harris:

Q And what was that conversation, Mrs. Mores?

A Well, he said he had been elected to some kind of an office, and he would have to sign a non-Communist Affidavit, and he was asking advice of my husband.

Q And who was that, that was asking this advice?

A Mr. Fisher.

Q Now, Mrs. Mores, prior to that time, had you ever seen the defendant at any Communist Party meetings?

A I had.

Q After that time, did you see him at any Communist Party meetings?

A Well, not for some time. I know in December, the 26th, right after Christmas of 1952, they wanted to have a meeting at my place Christmas Eve, but I were expecting a bunch from east of the mountains, and I didn't want to have the meeting, and they said they would have it the next day, after Christmas, and he was there.

MR. ETTER: I move that all that testimony be stricken. It refers to 'They said this' and 'They said that,' and 'They said the other thing.'

Is there any identification or any connection at all shown with the defendant, any conversation that this witness testified to?

THE COURT: This testimony, I take it, is not offered

as to the truth of anything that may have been said. It relates to fixing—

MR. HARRIS (Interposing): —a date.

THE COURT (Continuing): —the date of the meeting?

MR. HARRIS: That is all.

THE COURT: So that the Court will advise the jury that the testimony of this witness wherein she says they may have said something, that testimony is not to be considered as a statement of Mrs. Mores, is not to be considered as establishing the truth in any way of what was said, the purpose being to establish a date, rather than to establish what was said, at this time, at least.

MR. ETTER: I further object unless there is a connection shown between the defendant and 'they.' How can defendant be bound by what 'they' say?

THE COURT: This is a preliminary question, and not to be considered at all as to anything binding upon the defendant in any respect in regard to anything that may have been said, up to this point, as a result of the witness's testimony.

By Mr. Harris:

Q Mrs. Mores, now, when did the—if it did, when did the meeting actually take place in your home in December, 1952; on what day?

A The 26th day of December.

Q Was the defendant present at that meeting?

A He was.

Q What kind of a meeting was it?

A It was a Communist Party meeting.

Q Was he present at any other meetings after that date, that you recall?

A Well, I recall of one, and that was just about four days before the Smith Act trial, four or five days, be-

cause I knew my husband were going to be on the stand at that time when I were in the meeting.

Q And you say—was the defendant there at that meeting?

A Mr. Fisher?

Q Yes, Mr. Fisher.

A He was.

Q Where was this meeting held?

A It was held at the Art Halls, whether you call it the Cheney Place.

Q How many people were present?

A Oh, they were maybe six, seven—five, six, seven, in there.

Q Was your husband present at that meeting?

A He was.

Q And you say the defendant was present?

A He was.

Q What, if anything, did he say, the defendant, at that meeting?

A Well, he said as many people as could possibly get out should go down to the trial and make a showing.

Q What else did he say, if anything?

A Well, he was trying to get up all the money that he could get to fight the Smith Act trial.

Q Anything else that you recall? Was there anything said by the defendant concerning witnesses in the trial?

Mr. Etter: These questions, of course, are all leading.

The Court: Objection sustained.

Mr. Harris: If your Honor please—

Mr. Etter (Interposing): Counsel is testifying.

Mr. Harris: No, Counsel is not yet testifying. If your Honor please, I believe I have exhausted the witness's

recollection of that meeting, and I am asking her now if she recalls.

THE COURT: You might ask her again, so that that is conclusively brought forth. I don't think it is conclusively shown yet as to exhausting her memory.

MR. HARRIS: Excuse me, your Honor.

By Mr. Harris:

Q Mrs. Mores, was anything else said by the defendant at that meeting, the one that you—

A (Interposing) Well, I don't know. They were talking about some stoolpigeons, and things of that sort, you know. I didn't pay much attention, because I were awfully nervous, you know, because I just figured if they knew my husband was going to be on the stand, why, we would be just in bad.

Q Did the defendant participate in that conversation?

A He did.

MR. HARRIS: Your witness.

Cross-Examination

By MR. ETTER:

Q When did you first meet Mr. Fisher, Mrs. Mores?

A Oh, I would judge somewhere around 1946.

Q About 1946?

A I would judge it would be around close to then.

Q Do you know Mrs. Fisher?

A I do.

Q Do you know the children?

A No.

Q Have you been in the Fisher home?

A No.

Q You haven't, and you say Mr. Fisher has been at your home?

A He has.

Q And what was the first date that you recall? You said three or four years ago.

A That was one time that he had been in my home, before that one specific time.

Q You don't recall the other meeting, is that it?

A I don't recall the dates of them, but I have had several of them in my home.

Q Mr. Fisher had been to your home on business of the union? Had he not been there a number of times on the business of the union?

A Not to my recollection, because I didn't belong to no union at all. All I knew him to be there for was the Communists.

Q Your husband belonged to a union, did he not?

A He did.

Q Did he ever stop and talk to your husband about any union business?

A Not as I ever knew of, because he would always talk to him down at the hall where they had the union meetings.

Q Did you used to attend Communist Party meetings away from your home, too?

A I have.

Q You have? Prior to the date that Mr. Fisher came to your house?

A Yes.

Q Is that correct? And the date, I think you said, was three or four years ago, the first one that you recall?

A Yes.

Q Is that right, and then you said there was another. How many people were at that first meeting, do you recall, three or four years ago?

A There were only the three of us at this one time when I know he come down there.

He come in his work clothes, coming home from work.

Q There were only three there?

A Only three, him and myself and my husband.

Q And you had a meeting?

A No, we didn't have no meeting. He just come and told my husband he had been elected to some office and he would have to sign a non-Communist Affidavit, and he wanted to know what to do about it, so my husband referred him to the higher-ups in Everett.

Q Your husband—what you are saying is, Mr. Fisher came to ask your husband's advice?

A Yes.

Q The man who has testified here?

A Yes.

Q And that was the extent of that meeting?

A Yes.

Q And the next time that you recall that he came to your house was December 26th?

A Yes.

Q Of 1952?

A Yes.

Q Is that correct? You don't recall that he had been at your home at any time prior to—I mean, after this three or four years ago episode, and December, 1952?

A No, I don't recall.

Q I beg pardon?

A No, I don't recall of him being there.

Q And this time, December 26th, how many people did you say were there at your place?

A I don't think I said, but there were quite a few there at that time, at the last meeting. The last meet-

ing, there were only four or five, but this 26th, I think there must have been around eight or ten people at that meeting.

Q Around eight or ten people at that meeting?

A Yes.

Q People that you knew?

A Yes, people that I knew.

Q And Mr. Fisher was there?

A Yes.

Q And that was in your home?

A That was in my home.

Q And how long did the meeting last?

A Oh, it probably lasted until 10:30 or 11:00 o'clock that night.

Q It lasted until 10:30 or 11:00 o'clock that night?

A Yes.

Q That evening, I see. Did you say that you joined the Communist Party in 1942?

A Yes, the last time. The first time I joined it, I joined it in 1935.

Q In 1935?

A Yes.

Q I see.

A And we only remained in it a short while, because we kind of got in on the inside, and we figured out what it was, and we didn't want no part of it ourselves so we dropped out.

A I see.

A And then in 1942, why we decided then to work for the Government, and I and my husband came down to this building and seen them about it. First, there was one guy came up and had a talk with us, and so we didn't know whether he was from the Bureau or not, so we came down to check up on him.

Q You say that you had joined in 1935?

A I think it was in 1935.

Q Both you and Mr. Mores?

A Yes.

Q And where was that? Here in this State?

A Yes.

Q And you left in 1942?

A No, we only belonged to the Community Party in 1935 just a short while. Probably less than a year, and then we dropped out, and we were going to quit it cold, and not have anything to do with it, because we didn't want anything to do with it.

Q This was in 1935?

A Just to find out what it was. We didn't know. They put up a good line to us, and we went in to find out.

Q And you dropped right out?

A And we found out what it was, so we just dropped out.

Q And that was the last you heard of it until 1942?

A 1942, yes.

Q I see; when the Agent came to your place?

A Yes.

Q And he talked with you, did he?

A He first talked to my husband, and my husband—and I went down to the barn about my business, because I figured it was some logger with some timber, because he was working the woods at that time, and I went on about my business, and paid no attention, and he came down and told me it was for me, too.

Q Your husband came down?

A My husband, and I went up to the house and had a talk over, three of us together.

Q Where did you have the discussion?

A Right in my home.

Q At your house?

A Yes.

Q Not down at the barn?

A No.

Q. Or out in the front yard?

A No, right in our front room.

Q What was that discussion? Can you tell us?

A Well, he just asked us, had we been in the Party, and we told him "yes, we had," and he said he would like to get some information on the inside and he asked if we would join and pick it up, and my husband said "If you think it will do the Country any good, I will, if she is willing. I have got two brothers over there fighting today, and I feel it is our duty to do a little something."

Q That was—did he say how he had known, how this Agent had known you and Mr. Mores had been in the Communist Party before?

A No, he didn't.

Q Did you inquire?

A No.

Q Or how he found out, or anything like that?

A No.

Q And was there some agreement that you reached at that time?

A No.

MR. HARRIS: I am going to object, your Honor. It is improper cross-examination. I don't think I went into that.

MR. ETTER: I don't think, if she admits she is a member of the Communist Party, and is testifying to meetings, that I am limited in the cross-examination to a

specific instance. I have a right to inquire into the association.

THE COURT: Yes, I think I should overrule the objection. Is there a pending question?

MR. ETTER: I don't believe so.

MR. HARRIS: I thought there was a question about conversation with an F.B.I. Agent.

THE COURT: I think the last question was answered.

MR. HARRIS: All right.

By MR. ETTER:

Q Was there any condition discussed upon the basis that you and your husband would rejoin the Communist Party at that time, that first discussion you had with the gentleman at your house?

A I don't get your question.

Q Did you have any discussion about what you were supposed to do, or any conditions?

A No.

Q Well, did your husband say anything about—to the Agent, that he would find out what he could about the Communist Party, and that that was all?

A Yes, that is all.

Q Did he say to him that if a union man would blow up a bridge, he wouldn't tell the F.B.I. man about it? Did he say that to him?

A No.

Q I beg pardon?

A I don't think he did. I didn't hear it, if he did.

Q Did you ever hear him say that?

A No.

Q After that meeting, you say you came down to Seattle. Did you come down to Seattle?

A I have been to Seattle to Communist Party meetings, if that is what you are getting at.

Q No, after the meeting with the gentleman from the Federal Bureau of Investigation?

A Oh yes, we came to Seattle right to this building, and checked up on him to find out if he were from the Federal Bureau.

Q How soon was it after that meeting?

A Well, it was in less than a week.

Q Less than a week?

A Yes.

Q Did you see him,—the same fellow—down here, that had been up to see you?

A No.

Q You did not?

A No. We went to the highest guy down here, and I think his name were Clark, at that time.

Q And you went back up to your home?

A Yes.

Q And had another visit from an Agent?

A We had several visits. We never had no more until after we joined the Party.

After we came down and talked to the guy in charge down here, we went back up and waited until they came and asked us to join the Party back, and then we joined the Party back.

Q How long was that after your visit here?

A About three weeks, someone came along and asked us to join the Party back.

Q Was it the same Agent?

A No, it was some Party member.

Q I beg pardon.

A Some Party member.

Q Some Party member?

A Yes.

Q And did you join then?

A We joined.

Q I see.

A And after we joined, my husband got connection with them some way. I don't remember whether he called him up, or whether he got in connection with him, but we had joined the Party back, and then he come up and he had a visit.

Q Your husband got in contact with them?

A He got in contact with them after we joined the Party.

Q Did he tell you that?

A Yes.

Q He didn't tell you how he got in contact?

A No, I don't remember, because he has a lot of phone calls, and he has a lot of different ones.

Q Did he phone the F.B.I. a considerable number of times?

A He has.

Q He has; and the next time the Agent came up, where did you see him?

A We usually met him in a car.

Q I mean the next time that you saw the Agent from the Federal Bureau of Investigation after you joined the Communist Party.

A He came to my house.

Q He came to your house?

A Yes.

Q All right.

A And my husband wasn't home; he was working at Granite Falls.

Q He was what?

A Working at Granite Falls, and he didn't get to see

him, and he made two or three trips over to Granite Falls, before he could find my husband, because he were out in the woods, working.

Q He came there, and your husband was in Granite Falls?

A Yes, the Agent came to my house, in Gold Bar, and to Granite Falls.

Q Did he find your husband that day?

A Not the first day. He made about three trips there before he found him. He wasn't used to the woods, and didn't know how to get around in the woods.

Q Do you know how many days it was after that that your husband told you he seen the Agent again?

A I don't know. He made a date with my husband to be home on a Saturday, I think; Saturday evening; we seen him at the house, at that time, yes.

Q All right, and where did you have your discussion with him at that time?

A Well, probably sitting out in the car. We have had so many different discussions with him.

Q When did you make a definite arrangement about what you would do and how your expenses or your pay would be taken care of?

A We didn't have no—

Q (Interposing) I beg pardon?

A We didn't have no agreement.

THE COURT: When you say "we," who are you talking about?

THE WITNESS: I and my husband.

By MR. ETTER:

Q Did you have any meeting where there was any arrangement discussed for expenses, or otherwise?

A We didn't know we were going to get a penny out

of it until one time he came up and gave us fifteen dollars, and said, "That is to help pay expenses."

Q I see; when was that, do you remember?

A Oh, probably about one month after we got in touch with them after we joined the Party.

Q Was that in 1942?

A I judge it was in 1942.

Q I beg your pardon?

A I judge it would have been in 1942. That is when we joined back.

Q And you had no arrangement about expenses up to that time?

A No, we never even talked them over with them at all, because we figured we was doing a duty to our Country.

Q And he came up and gave you fifteen dollars?

A He came up and gave us fifteen dollars, the first time.

Q All right; did you give him a receipt?

A Yes, we always signed a receipt.

Q You always signed a receipt?

A Yes, I and my husband, both.

Q And how long was it after he gave you the fifteen dollars that you received any more money?

A About one month.

Q About one month?

A Yes, we received fifteen dollars more in about a month.

Q You received about fifteen dollars more in about a month?

A Yes.

Q And was that how much you received each month, about fifteen dollars?

A We did, for quite a little while, and then they raised it up to $30 and then they raised it up to probably $40 or $50, and then we got up as high as $175. I think we got that for about three or four months' work before my husband went on the stand, because he were making lots of trips down here to Seattle.

Q Were these payments made reguarly per month?

A Yes.

Q Pardon?

A Yes.

Q And that is in 1942 or 1943?

A Yes.

Q How long were you paid fifteen dollars a month regularly, do you remember?

A I couldn't say, but that was some time. We were paid fifteen dollars for over a year, probably.

Q And how much then, did you get, thirty dollars?

A Yes.

Q And do you recall how long you received thirty dollars?

A No, I don't recall that.

Q And the next amount?

A I don't know. They kept raising it on up until—

Q (Interposing) They kept raising it?

A Yes, as he was sent farther off to meetings and more of them they would raise it a little more for expenses, because sometimes I had to hire somebody to help me with the work at home.

Q And he would make reports?

A Yes.

Q Would you help him with the reports?

A Sometimes I would, if I happened to comment, and lots of times I would because I didn't know if he would make it back or not.

Q Who paid for the long distance calls he would make?

A I don't know; I was never in the phone booth with him; because he used the pay phone in Monroe.

Q He used the pay phone in Monroe?

A Yes.

Q You don't know who paid for it?

A I know he paid for it that one time. But the other calls, I don't know whether he paid, or they paid, but I know that one specific time when we drove to Monroe to make a phone call, that he paid.

(Whereupon, there was a brief pause.)

MR. ETTER: Your Honor, may I confer with counsel a moment?

THE COURT: You may.

(Whereupon, counsel for defendant conferred at counsel table, and after a brief pause, the following proceedings were then had, to-wit:)

MR. ETTER: One or two questions, Mrs. Mores.

By MR. ETTER:

Q Were you subpoenaed here today?

A No.

Q Did you receive a subpoena?

A No.

Q When were you asked to come down today?

A I were asked, I judge, about 10:30.

Q 10:30 when?

A Today.

Q Today?

A Yes.

Q To come down?

A Yes.

Q You weren't—hadn't been asked at any time before?

A No, an agent told me this morning that I might be called down today.

Q When?

A He told me that about a quarter after six this morning.

Q So that you were called about 10:30 and have been here since?

A Yes, about 10:30.

Mr. Etter: Thank you, Mrs. Mores. That is all.

4. EXCERPTS OF TESTIMONY OF HARLEY MORES

By Mr. Harris:

Q When did you first make his [Appellants] acquaintanceship?

A Well, that I am not too sure of, but I believe it was in 1935 or 1936.

Q 1935?

A Wait a minute, wait a minute, now.

(Whereupon, there was a brief pause.)

A (Continuing) I am not too certain on that. It might have been 1937. I ain't too sure.

Q Was it before the time you were working in the shipyards, or after the time you were working in the shipyards in Everett?

A It was after that, I believe.

Q And when were you working in the shipyards in Everett?

A 1943.

Q 1943 to when?

A It might have been 1946 I run across him, 1947.

Q You have said previously it might have been '37. Did you mean '47 or '37?

A Well, it could have been '47. I am not too sure on that date I recollect. (R. 101)

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Q How did you join the Communist Party?

A Well, there were members of the Communist Party that asked me to join in, and handed me literature and asked me time and again to join and to attend open meetings, which I did. They would have an open meting once in a while, to try to get new members in. I attended some of them, and I joined.

Q You say they had an open meeting; what do you mean, open to the public?

A What?

Q Open to the public?

A No, I wouldn't say that.

Q Well, an open meeting—

A (Interposing) Open meeting to the ones they invited. If someone came they didn't want, they wouldn't hold a meeting, I know that.

Q I see, that was in 1934?

A Well, I ain't sure what year it was.

Q When was it that you—these people handed you literature and talked to you about joining the Communist Party? Do you remember when that was?

A Well, no, I don't. Before I joined, for a year or two, I had had literature handed to me, and I was acquainted with several of them.

Q You had had literature handed to you?

A Yes, I did.

Q For a year or so before?

A Oh, yes, one or two years, probably.

Q Pardon?

A One or more, probably.

Q Did I understand you to say on my cross-examination a question or two ago, that members, some members, of the Union gave you Communist Literature?

A In later years, yes.

Q I mean before you joined the Communist Party?

A I don't recall saying that.

Q I beg your pardon?

A I don't recall saying that.

Q I don't know whether you did or not. As a matter of fact, did any of the Union members give you Communist literature before you joined the Party?

A I don't know whether they did or not.

Q I beg your pardon?

A I don't recollect.

Q Whether they did or not?

A No, I don't.

Q But I gather that you had been given this literature for the year, did you say, or two, before you joined the Party?

A I believe so. (R. 179-181)

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Re: Memory of Dues

Q Isn't it a fact now, Mr. Mores, and I want you to think about this, that from 1946 a Communist Party member with an income of over sixty dollars paid two dollars a month dues; a member of the Communist Party who had an income of twenty-five to sixty dollars a month paid one dollar dues; a Communist Party member who had an income of less than twenty-five dollars paid thirty-five cents per month dues; and an unemployed member of the Party paid ten cents?

A I don't recollect it that way, I don't think. (R 234-235)

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Re: Fisher's Car and Meeting Fisher

Q On your direct, your first answer was you thought you met him in '35 or '36, and you said you weren't certain, that it might have been in '37, and you said you might have met him in '47; and now, you say you might have met him in '46?

A '46 or '47.

Q What is your answer now, what year, roughly?

A Either '46 or '47.

Q It was either '46—

A (Interposing) I think that is when I met him.

Q (Continuing) —or 1947, is that correct? You said likewise that you had ridden a number of times in Mr. Fisher's car?

A No, I don't believe I did.

Q I beg pardon?

A I don't believe I did.

Q Did you ever ride in Mr. Fisher's car?

A Oh, yes, I have. The time I was thinking of, I was riding in another man's car, and he rode with us. I thought that is what you were talking about.

Q You never did ride in Mr. Fisher's automobile?

A Well, I was just a studying, since you mentioned it, whether I did or not.I might have. I don't know.

Q Did Mr. Fisher ever ride in your car?

A I can't answer that one, either. I don't know.

Q You don't know?

A No. The meetings were all close together up there.

We might have took both cars or he might have went with me or I went with him. I don't remember.

Q At the time you went to a meeting you said you went in another man's car?

A That is right, another party's car.

Q Both you and Mr. Fisher?

A Yes, that is right.

Q I think you — do you know when Mr. Fisher joined your Local; that is, the I.W.A. Local, at Sultain? I guess it was the Sultan Local?

A I do not.

Q Did you attend the Union meetings?

A Oh, I attend part of them. We don't attend all the meetings.

Q Well, do you recall whether you saw Mr. Fisher at the Union meetings?

A Sure, I have saw him at Union meetings.

Q I beg pardon?

Q And can you tell us when you first saw him at a union meeting?

A No, I don't believe I can.

Q Can you remember, or can you tell me, the last Union meeting that you attended where Mr. Fisher was present? That is, of you recollection?

A No, I couldn't tell you that date, either. (R. 270-272)

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Re: When Saw Fisher:

Q Do you know—you met Mr. Fisher, I think you said, in '46 or '47, is that correct?

A Well, I believe it is the best of my recollection that one of them years I met him.

Q One of those years?

A Yes.

Q You saw him, I gather from your testimony, in '48, '49 and '50; isn't that correct?

A Well, I recollect seeing him in 1949, and I had seen him the previous times before that at various and different places. I saw him in 1949 and '50. I didn't see him much in '50, '51 and '52.

Q You didn't see him much?

A Let's see, 1949, in 1949, about January 1st, I believe it was, he come to my place, and I don't recollect seeing him too much then for awhile.

Q I wish you would speak louder, Mr. Mores.

A In '49, January 1st, I believe, he come to my house, and it seems like I didn't see him very much for about a year.

Q You say that in January of '49—

A (Interposing) I am not too sure on that date. I think it was in there.

Q He came to your house?

A Yes.

Q Had you seen him in—then, I gather your testimony is you didn't see much of him in 1950 and '51?

A About one year, I didn't see much of him.

Q Would that be from '49 until '50?

A Yes, I believe it was.

Q You didn't see much of him?

A No.

Q Is that right?

A Yes.

Q Well, did you see him in 1950, the year 1950?

A It might have been '52, in September, when I seen him last. I ain't sure.

Q It might have been '52? As a matter of fact, from '49 until '52, you didn't see Fisher, did you?

A I don't recollect whether I saw him much in that time or not.

Q Your testimony was it was December 26th, of 1952, that you saw the Defendant Fisher?

A January, wasn't it?

Q You can state January or December; I thought you said December.

A Wait a minute now. Which year are you talking about?

Q 1952.

A That was September.

Q September?

A In 1952, I think it was September.

Q I don't want to confuse you, Mr. Mores.

A I know that.

Q I think you testified you saw Mr. Fisher on December 26th, at your house, of 1952.

A Wait a minute, December 26th?

Q Of 1952; I think that was your testimony.

(Whereupon, there was a brief pause.)

A *I don't recall those dates exactly,* but you have literature with those dates on them that I turned in here.

Q Whatever it may be, whether December of '52 or September of '52, after he came to your house in 1949 you didn't see Mr. Fisher again around that country until '52, isn't that correct?

A I wouldn't say I just actually saw him, but he wasn't so plentiful around there as he was before.

Q That is right; did you know what he was doing then from '49 on up until at least through '50?

A Why, sure; I seen him in our Local Union meetings, but he didn't come to my house.

Q I see. And you saw him at Local Union meetings during that time?

A Occasionally, I didn't attend all of them, I would see him once in a while.

Q Do you know whether he had some other position here in Seattle or not?

A In Seattle?

Q Yes.

A No, I didn't. Wait a minute. What way, a job?

Q Did he have any title, or an officer of some group, or anything like that, here in Seattle?

A No, if he was an officer of some group here, I didn't know that.

Q Well, did you know whether he was — did you know whether he had any occupation than working as a woodsman or as a man in the woods in '46; did you know whether he had any position or office that he held here in the City of Seattle?

A No, I didn't.

Q Or did you know that in 1947 whether he held an office or position here in the City of Seattle?

A No.

Q Or '48?

A (Witness nodded in the negative.)

Q Or '49?

A No.

Q Or any time beyond, isn't that correct?

A I don't recall it. (R. 273-277)

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Re: Knowledge and Memory of Fisher and Taft-Hartley Affidavit:

Q Now, isn't it a fact, Mr. Mores, that in '46, '47, '48 and '49, that Mr. Fisher was the Secretary-Treasurer of the Washington State CIO Council here in the City of Seattle?

A I don't know.

Q I beg pardon?

A I don't know.

Q You don't know, but you knew him through those years, isn't that correct?

A I believe I did.

Q You believe you did, and didn't you know with respect to those years — did you know whether Mr. Fisher was or had been the Secretary of the State CIO Council located here in the City of Seattle?

MR. HARRIS: Your Honor, I will object to that as repetitious. I think I objected last Wednesday because of the form, and it was not in evidence, and Counsel reframed the question,. and this witness said he didn't know whether he was or not.

MR. ETTER: He didn't know in that year, not that he didn't know at all.

THE COURT: I will overrule the objection.

Q (Continuing) I might put it this way: Do you know whether or not Mr. Fisher was at any time Secretary of the Washington State CIO Council?

A I did not.

Q You do not; you said that you talked to Mr. Fisher about his executing a Taft-Hartley affidavit; do you remember?

A I did.

Q When was that?

A *I don't recollect that date this morning, either.* (R. 298-299)

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Identification of Exhibits 7, 8, and 9 by word "Bear":

Q Mr. Mores, Plaintiff's Exhibit No. 7, there is some writing at the top of the exhibit, and I would like to have you look at it and tell me when you put that writing on the exhibit, when you wrote on it.Let's put it that way.

A Well, I put this on here on December 26, 1952.

Q December 26, 1952?

A Yes.

Q All right; now, the word over here, "Bear"?

A That wasn't put on the same time, either.

Q That wasn't put on the same time either; when was "Bear" put on?

A That was put on at the time I handed it to the Agent.

Q At the time you handed it to the Agent, I see; what was the reason, do you recall the reason, that you gave on your direct examination, for writing the word "Bear" on these two exhibits?

A That was a name that was arrived at instead of using my own name.

Q No, but do you remember the reason that you gave the Jury for putting the word "Bear" on these two exhibits; do you remember what you told Mr. Harris and the Jury?

A The reason was in case it was found by someone else, they wouldn't know who had the paper.

Q That is right; they wouldn't know who was holding onto it, is that the idea?

A That is right.

Q What do you mean, "found by somebody else"? You mean intercepted, or something like that, before you could turn it over to the F.B.I.?

A Well, I don't quite get the meaning of your question.

Q Well, you say you put that on so that, as I gathered it, so that if somebody found this paper, they wouldn't know who had it, is that right?

A That is right.

Q They wouldn't know who had it, and when would you put that word "Bear" on there?

A When I got ready to hand it to an Agent I usually wrote that on.

Q When you handed it to an Agent, you wrote that on; and that was so that it couldn't be identified?

A That is right.

Q But the same time you got it, you wrote on it, "Received from Al Fisher at Harley Mores," and then had your wife put her name on it, is that the idea; is that what you want us to believe?

A I didn't quite catch that reading there.

Q Well, you stated that very soon after, as quickly as it was expedient, I assume, you put this writing on the top, "Received from Al Fisher at Harley Mores, December, 1952"; that shortly after you would write that on and put your name on there and your wife's name?

A I didn't say her name was put on there at that time.

Q This was "Received from Al Fisher at Harley Mores"?

A I believe it was put on there at the time.

Q But then you wrote "Bear" on there to hide your identity, is that correct?

A That was the idea.

Q And you put it on after you made this inscription?

A That is right.

Q So that if the paper had been found or picked up after you wrote this, and before you put "Bear" on there, all it would have on it was, "Received from Al Fisher at Harley Mores," isn't that right?

A That is all.

Q And in your handwriting?

A It would be. (R. 299-303)

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